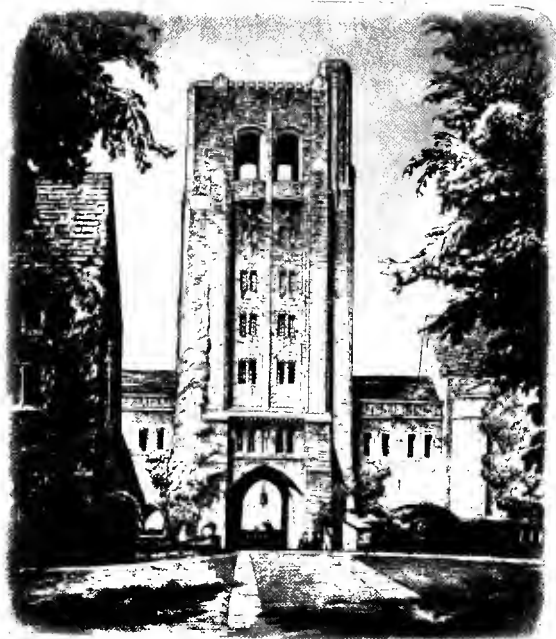




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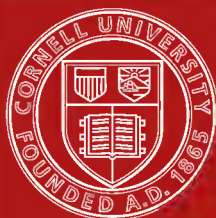


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CASES
DECIDED
IN THE SUPREME COURT
OF THE
CAPE OF GOOD HOPE,
DURING THE YEAR
1875.

WITH TABLE OF CASES AND ALPHABETICAL INDEX.

VOL. V.

REPORTED BY
EBEN. J. BUCHANAN,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.



J. C. JUTA & CO.,
CAPETOWN. | JOHANNESBURG.
1892.

JUDGES OF THE SUPREME COURT

DURING THE YEAR

1875.

MA 4659

DE VILLIERS, C. J.

DENYSSEN, J.

FITZPATRICK, J. : On leave from 15th June.

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PROCLAMATION, 6th August, 1873.—See Quit-Rent.	
PRODIGAL.—The Court appointed a Curator of the joint estate of persons married in community, on the petition of the wife, on the grounds that her husband's brain was in a diseased state, the result of recent illness, and that he was squandering his property. <i>In re Filmer</i>	2
PROMISSORY NOTE.—A creditor who has <i>bonâ fide</i> received payment and given up a promissory note shortly before the insolvency of the debtor, such payment having been with the intention of unduly preferring not the creditor but the endorser of the note, may be compelled to refund the amount received by him to the trustee of the debtor's insolvent estate, but such trustee must give the creditor an indemnity, in terms of the 90th section of the Insolvent Ordinance. <i>Thorne's Trustee vs. Friedlunder</i>	81
— Provisional sentence refused on a promissory note in the hands of a third party, where the words "or order" had been re-inserted after signature, such words having been erased before signature. <i>Pulvermacher vs. Searle</i>	84
PROVISIONAL SENTENCE.—Refused on an I. O. U., which had been given to the plaintiff for money lost in gambling at cards by the defendant. <i>Sonnenberg vs. Flower</i>	4
— Refused on a promissory note in the hands of a third party, when the words "or order" had been re-inserted after signature, said words having been erased before signature. <i>Pulvermacher vs. Searle</i>	84
— See Principal Case.	
PROVISIONAL TRUSTEE.—See Insolvency.	
QUIT-RENT.—Lands held on quit-rent tenure, not being converted loan places, are not, in the absence of any special reservation in the original grant, subject to the right reserved to Government by the provisions of Sir John Cradock's Proclamation of 6th August, 1813, of raising materials thereon for the purpose of making or repairing public roads. (DE VILLIERS, C.J., <i>diss.</i>) <i>De Villiers vs. The Cape Divisional Council</i>	50
— Above decision reversed on appeal to Privy Council. <i>The Divisional Council of the Cape Division vs. De Villiers</i>	175
RECONVENTION.—See Pleading.	
REPLICATION.—See Pleading.	

REVIEW OF JUDGE'S ORDER.—See Insolvency.

RIGHT OF WAY.—See Trespass.

ROADS.—Materials for repairs of. See Quit-Rent.

RULE OF COURT, No. 19.—The notice required to be given under Rule of Court No. 19, must be in writing. A verbal notice is insufficient. *Jones vs. Borradaile, Thompson, Hall & Co.* .. 18

RULES OF COURT.—New Rules as to Practice and Pleading .. 175

SEDUCTION.—In an action of damages for seduction, the benefit of the doubt on the evidence ought to be given in favour of the defendant. *Botma vs. Retief* 120

SEQUESTRATION.—See Insolvency.

SET-OFF.—See Pleading.

SHIP.—Where a vessel was chartered to convey a load of wheat and flour to Table Bay for orders, to discharge there “and” “or” at one other Cape port, orders to be given within forty-eight hours after arrival of vessel is reported or demurrage to be paid, and provisional orders were given within the specified time to go into dock and discharge at Table Bay, but before the whole of the cargo was discharged the master was required to take part of the cargo to another Cape port, which he refused to do, but discharged the whole of the cargo at Table Bay. HELD (FITZPATRICK, J., *diss.*), that the captain was bound to take so much of the cargo to the other Cape port as was on board when the order was received. *Slavo vs. Goodliffe, Smart & Searle* 11
 — *Semle*,—Demurrage is not claimable for delay arising from nonpayment of freight. *Ibid.*

— A ship-owner cannot insist that Bills of Lading be given up before delivery is made of the goods to which they refer. *Hamilton Ross & Co. vs. Donald Currie & Co.* .. 20

— Where a Bill of Lading made goods deliverable “to order” and the goods were delivered at the port of destination, but without the production of the Bill of Lading, to the person for whom the goods were shipped, the ship-owner held liable for the value of the goods, at the suit of the endorsee and holder of the Bill of Lading. *L. & S. A. Bank vs. Donald Currie & Co.* .. 29

SIR JOHN CRADOCK'S PROCLAMATION.—See Quit-Rent.

SUB-LETTING.—See Lease.

SUMMONS.—See Costs.

SURVEY EXPENSES.—See Costs.

TEMPUS MORÆ.—Whether interest on an account acknowledged correct accrues, in the absence of proof of any previous demand, from the date of stating the account, or of summons. *Fletcher & Co. vs. McLaglin* 93

TENDER.—Plea of. See Pleading.

TRESPASS.—Exception of non-joinder of plaintiffs, in an action of trespass, on the ground that the land trespassed upon was in the occupation of the plaintiff, to be worked by him on condition of his dividing the crops raised with the owner of the land, overruled. *Maasdorp vs. Malan* 13

— A servant of a co-proprietor in undivided shares in a farm,

- acting under the instructions of his master, is not punishable criminally, under the provisions of Act No. 15, 1875, for removing the eggs of wild ostriches found on such farm, though such removal was against the wishes of the other co-proprietors of the farm. *Qu-en vs. Jantje Androo* 137
- TRESPASS.—An interdict granted, restraining the defendant from conveying the drainage water from his property into a ditch passing through land over which the plaintiff had a right of way. *Hofmeyr vs. Hofmeyr* 141
- A question of infringement on a right of way can be properly tried in the form of an action of trespass. *Ibid.*
- TRUSTEE.—See Insolvency.
- TRUSTEE'S ACCOUNTS.—Filing of. See Insolvency.
- UNDUE PREFERENCE.—See Insolvency.
- WAY.—Right of. See Trespass.
- WILD OSTRICH ACT.—No. 12, 1870. See Evidence.
- No. 15, 1875. See Ostrich.
- WILL.—Husband and wife having, by mutual will, bequeathed certain landed property to their two sons, “in the first place for both of them, and secondly the eldest son of our grandchildren shall always have the same rights thereto;” and after the decease of the testators (the legacy having vested) one of the sons died,—HELD, that there was no *jus accrescendi* in favour of the surviving son, but that he was entitled to his interest in half only of the property. *De Jager vs. Scheepers* 86
- A document written and signed by a parent, dividing his property among his children, is a privileged testament, and is valid as a last will, although not executed with the formalities required by Ordinance No. 15, 1845. *Ex parte De Wet* .. 119
- A holograph will of a parent, disposing of his property among his children, is a privileged testament, and is not subject to the provisions of Ordinance No 15, 1845, as to attestation. *Executors of Eaton vs. Eaton* 173
- WITNESS.—See Perjury.
- WITNESS EXPENSES.—See Costs.

SUPREME COURT REPORTS.

1875.

PART I.

In re INSOLVENT ESTATE OF MORRIS.

Ord. No. 6, 1843, sec. 43.—*Practice.*

Insolvency.—Provisional Trustee: appointment of.

The application for the appointment of a provisional trustee to a sequestrated estate, should be made to the Court, and not to a single Judge in Chambers.

Maasdorp applied for the appointment of J. G. F. Pietersen as provisional trustee of the insolvent estate of William Morris. A rule *nisi* had been obtained from Mr. Justice Fitzpatrick in Chambers, on the 6th January, returnable this day, appointing Mr. Pietersen. It was considered doubtful whether, under the 43rd section of the Insolvent Ordinance, an order of this kind should be granted by a single Judge. The practice had been to obtain an order from one Judge and have it countersigned by a second Judge.

1875.
Jan. 12.
In re Insolvent
Estate of
Morris.

The Court intimated that this practice should be discontinued. Applications, if out of term, ought to be made on the Chamber days fixed by rule of Court. In cases of emergency notice could be given to the Registrar, and the Judges would sit specially to hear the application.

Order granted as prayed.

[Applicant's Attorneys, CHRISTIE & DU PREEZ.]

*In re FILMER.**Curator.—Prodigal.—Joint Estate.*

The Court appointed a Curator of the joint estates of persons married in community on the petition of the wife, on the grounds that her husband's brain was in a diseased state, the result of recent illness, and that he was squandering his property.

1874.
Dec. 10.
1875.
Jan. 12.

In re Filmer.

The petition of Mrs. Agnes Filmer set forth that she had been married to her present husband, in community of property, on the 27th December, 1853. That there were seven children issue of such marriage. That about five years ago her husband received a sunstroke which necessitated his being under medical treatment for some time. That, for the last fifteen or eighteen months, he had been attended by Dr. Rhind, who was of opinion that Mr. Filmer's brain was in a diseased state, the effects of the sunstroke before referred to. That on the 1st April, 1874, Mr. Filmer sold his farm, and signed a power to give transfer so as to enable the purchaser to raise a sum of £1,000 on mortgage to be paid over to Mr. Filmer. That the £1,000 was raised and obtained by the agent, who retained possession of the amount. That throughout the present year Mr. Filmer had been at times suffering from great dejection of spirits and neglected his farming pursuits, at times expressing himself apprehensive of an attack from the Kaffirs generally, and especially from his own servants, and that during these periods his dejection of spirits was such that fears were entertained that suicide might be committed. That these periods of dejection were succeeded by periods of excessive excitement, during which he would gallop about the country, and had attended sales and purchased most recklessly without any regard to the amount he paid or his necessity for the property purchased, these sales having been held by the agent before mentioned, who was also an auctioneer, and that accounts received from the said agent and auctioneer showed purchases amounting to £873 2s. 2d. That although the said agent had the said sum of £1,000 in his hands he had from time to time prevailed upon Mr. Filmer to sign promissory notes for the amount of the vendue accounts, which notes were still running. That it was necessary for the protection of the joint property that the joint estate should be placed under curatorship, as otherwise Mr. Filmer would be victimised by designing and unprincipled men, and petitioner and her children reduced to poverty.

Jacobs, A.G., put in verifying affidavits made by Mrs.

Filmer and Dr. Rhind; and in support of the petition cited *Van der Linden*, p. 85; *V. D. Keessel*, Th. 165.

The Court appointed Mr. Frederick Jones provisionally as curator for the purposes required; and directed that Mr. Filmer be personally served with a rule, to show cause on the 12th January why Mr. Jones should not be confirmed as curator, or some other person appointed.

Postea (January 12th) the rule having been duly served, and no appearance made on behalf of Mr. Filmer,

The Court confirmed the appointment of Mr. Jones for six months, with leave to apply again if necessary at the expiration of that period. This order to be served on Mr. Filmer personally, and he to be at liberty at any time to apply for its discharge.

[Applicant's Attorneys, REID & NEPHEW.]

RABIE, APPLICANT, *vs.* NAUDE, RESPONDENT.

Witnesses' Expenses: taxation of.

When absolution from the instance is granted, the Master should, on taxation, allow the expenses of witnesses material for the defence, although at the trial it became unnecessary to examine such witnesses.

During last term an action was brought by Naude, the present respondent, against Rabie, the applicant, respecting certain disputed water rights. At the close of plaintiff's case, absolution from the instance was granted by the Court with costs. On taxation, the Master disallowed the expenses of defendant's witnesses, as they had not been called at the trial.

Jacobs, A.G., for the applicant, now moved on notice calling upon respondent to show cause why the Master should not be directed to review his taxation, and to allow the expenses of the said witnesses and the costs of subpoenas. He cited *Archbold's Chitty's Practice*, 12th ed., p. 514.

Buchanan, for the respondent, showed cause, and read the affidavit of respondent's attorney, which stated that it had been the practice of the Master to disallow the expenses of all witnesses not examined at the trial, as without such examination it could not be ascertained whether their evidence was material or not. The only instance in which this rule had been departed from was in *Louw vs. Hofmeyer*, *Buch. Reports*, 1869, p. 294, which was an exceptional case,

1874.
Dec. 10.
1875.
Jan. 12.

In re Filmer.

1875.
Jan. 12.
Rabie *vs.* Naude.

1875.
Jan. 12.
Rabie vs. Naude.

the *bona fides* of defendant's conduct as an auctioneer having been impugned.

The Court was of opinion that in this case the expenses of defendant's witnesses ought to be allowed. Absolution from the instance was granted because the plaintiff had wholly failed in making out his case; and under these circumstances it would be unjust to throw upon the defendant the expenses he had been put to to meet the plaintiff's claim. The matter must be sent back to the Master with instructions to allow the expenses of the witnesses necessary for the defence. In ascertaining what witnesses were so necessary, the Master would be assisted by Counsel's opinion and advice on evidence.

Ordered accordingly, with costs to the applicant.

[Applicant's Attorney, DE KORTE.
Respondent's Attorneys, FAIRBRIDGE & ARDERNE.]

SONNENBERG vs. FLOWER.

Provisional sentence.—Gambling.

Provisional sentence refused on an I. O. U., on the ground that the debt was the result of gambling at cards.

1875.
Feb. 1.
Sonnenberg
vs. Flower.

Provisional sentence was prayed on an I. O. U. for £515, signed by the defendant.

Cole opposed, on the facts set forth in the following affidavit: "George Edward Flower, of Cape Town, the above-named defendant, maketh oath and saith that he received no value or consideration for the I. O. U. for five hundred and fifteen pounds sterling, upon which he is sued in the present action. That on Sunday night, the 24th ultimo, about half-past eight o'clock, deponent visited the Royal Hotel, in Cape Town, and whilst standing at the bar of the hotel the plaintiff, Isaac Sonnenberg, came up and spoke to deponent, and invited him into his private room at the hotel. That whilst in the said room deponent, having one evening previous lost upwards of £100 playing at cards with the said Sonnenberg, and being anxious to regain the same, invited the said Sonnenberg to join in a game of *écarté*, which they continued for some time. That a short time afterwards a Mr. Lowenthal entered the room, and joined deponent and the said Isaac Sonnenberg at the invitation of the latter. That all three played at a game of *vingt-et-un* for several hours, and at the end thereof deponent was indebted to the said Sonnenberg in the said

sum of five hundred and fifteen pounds, for which he granted the I. O. U., upon which he is now sued."

The plaintiff, in reply, deposed:—"That it is not true that plaintiff invited Mr. Lowenthal to join himself and the defendant in a game of cards, but that the suggestion came from the said defendant himself and that he urged the said Lowenthal to join. That plaintiff was strongly pressed by the said Flower to play, and only consented after cautioning him not to play as he was in bad luck, to which he replied, 'Never mind, I am able to lose a thousand pounds.' That plaintiff also said it was getting late and the hotel would be closed, hoping thereby to prevent his persisting in his determination to play, to which he replied that he could go through the window the same as he had done the previous evening. That the playing continued until 3 a.m., when plaintiff insisted upon stopping, and would not consent to the proposal of the defendant to play until breakfast-time, and that it was only on the promise of plaintiff's consenting to play next evening, that he induced defendant to stop."

Jacobs, A.G., for the plaintiff, urged that the document sued on being indisputably liquid, provisional sentence should be granted, leaving it to the defendant to prove his defence in the action on the merits. It was not clear to what extent the allegation of gambling might afford a defence to provisional sentence. Two cases were given in *Menzies* where the debt arose out of speculations on the Stock Exchange, but no decision was given as the Court was divided (*Freshfield vs. Harries*, 1 *Menz.*, 84; *Kenneel vs. Harries*, 1 *Menz.*, 85). It was not proved that the debt had been incurred through losses at cards.

DE VILLIERS, C.J.:—If I had any doubt as to the fact whether this was a gambling transaction or not I would have given provisional sentence. It is not denied that the parties played, and the defendant lost, besides cash out of pocket, £515, for which he gave this I. O. U. There can be no doubt this was a gambling debt. As to the law, to say the least of it, it is doubtful whether an action can be maintained for a wager. *Grotius* (3, 3, 49) lays down that by common law no one can lose more by gaming than he has brought in his pocket; all further promises beyond that are null. With that passage before us I do not see how the Court can grant provisional sentence.

. Provisional sentence accordingly refused, with costs.

[Plaintiff's Attorney, BUISSINNE.
Defendant's Attorneys, REID & NEPHEW.]

1875.
Feb. 1.

Sonnenberg
vs. Flower.

KOTZE, APPLICANT, vs. MCLACHLAN, RESPONDENT.

Witnesses' Expenses : taxation of.

In taxing witnesses' expenses, the Master must ascertain whether the witnesses were necessary and material, and not have regard only to the fact whether the witnesses were or were not called at the trial.

1875.
Feb. 5.
—
Kotze vs.
McLachlan.

Jacobs, A.G., for the applicant, moved upon notice for the review of the Master's taxation of the defendant's bill of costs in the case of *McLachlan vs Kotze*, as far as regarded witnesses' expenses disallowed by the Master. The action in question was tried last term, when judgment was given for defendant with costs. A number of witnesses had been subpœnaed for the defendant, the expenses of five of whom were disallowed by the Master on the ground, it was alleged, that although the witnesses had attended the trial, they had not been called or examined.

Buchanan, for the respondent, appeared to support the Master's ruling; and further urged that by the affidavits put in it was shown that the witnesses in question should not have been subpœnaed.

The Court referred the matter back to the Master, with instructions to consider in his taxation whether or not the witnesses were necessary and material.

[Applicant's Attorneys, BERRANGE & DE VILLIERS.]
[Respondent's Attorney, C. C. DE VILLIERS.]

QUEEN vs. KORCK.

Perjury.—Witnesses.

A conviction for perjury sustained, where the charge had been assigned on a false answer given by a witness in an action for divorce to a question which such witness was not compellable to answer, but to which no objection was taken.

1875.
Feb 5
—
Queen vs.
Korck.

The case of *Korck vs. Korck* was tried in the Supreme Court on the 25th August, 1874. It was an action for divorce brought by the wife by reason of the adultery of her husband. The husband was not represented by counsel. He was called as a witness by the plaintiff, and asked as to his relations with a Mrs. Exsteen. In reply to a question put by plaintiff's counsel he made the following answer:—

"I swear I had no connection with Mrs. Exsteen, or any one in the house." The divorce was not granted. Criminal proceedings were then instituted, and the husband was tried at the last Criminal Sessions held at Cape Town, before the Chief Justice, on an indictment assigning perjury on the above answer. The jury found the prisoner guilty. Arrest of judgment was moved on the ground that the prisoner could not be convicted of perjury in giving a false answer to a question put to him which question he could not have been compelled to answer. The presiding Judge passed sentence, but reserved the legal point for the consideration of the full Court.

Jones, for the prisoner, appeared to show that the conviction was bad. In the first place adultery was a crime (*Van der Linden*, 354), and the prisoner when in the witness box could not have been compelled to answer the question put to him, as the answer might tend to criminate himself (Ordinance No. 72, sec. 45). If a witness was not compelled to answer, he could not be convicted of perjury for giving a false answer (*Alison's Criminal Law of Scotland*, v. 1, p. 470). In *R. v. Gibbons* (31, L. J., M. C. 7), a witness was convicted for giving a false answer to a question which ought not to have been admitted, but that was different in principle as in that case the witness was bound to answer.

Jacobs, A.G., for the Crown, argued in support of the conviction. Perjury was said by *Van der Linden* (p. 314) to be a declaration under oath of that to be true which we know to be false. *Matthæus* (*de Crim.*, 48, 7, 12) defined a perjurer to be one *qui falsum testimonium dixit*. The Ordinance No. 72 assimilated the law of evidence in this Colony, in all cases not expressly provided for, to the law of England, so that a witness here had no greater privileges than a witness in England had. The definitions in English law at first sight apparently bore out the construction contended for by the other side. *Russell on Crimes* defined perjury as a false oath by one "lawfully required to depose the truth." The definition given by *Hawkins* was exactly the same as that given by *Russell*. In *Comyn's Digest*, vol. 4, p. 662, it is stated to be perjury "if he take an oath before him who has lawful authority to administer, and swear positively and falsely to a material point." None of the authorities expressly restricted the crime to false answers to questions which a witness was bound to answer. *Alison's* own definition (vol. 1, p. 465) was "the judicial affirmation of falsehood upon oath," and among other essentials he required that the falsehood must be in a matter pertinent to the issue and competent to be asked of the witness. But the case relied on by him (p. 470) was not decided, for the prosecutor

1875.
Féb. 5.
—
Queen vs.
Korck.

1875.
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Queen vs.
Korck.

abandoned the charge. The question put in the case under consideration was quite competent to be asked. The witness, might have declined to answer, but having answered he was bound to answer truly. An examination under oath might be used against the witness in a criminal charge (*R. v. Coote*, 4 L. R., P. C. Appeals, 599). In *R. v. Sloggett*, Dears., 956, where a bankrupt was examined touching a matter not relating to his trade, and did not refuse to answer on the ground that his answers would tend to criminate himself, his examination was held to be admissible against him. The American authorities made no distinction such as that now, contended for, but laid down that a witness was liable for his answers as he was sworn to speak the truth. (*Bishop's Com. on Crim. Law*, sec. 1032.)

Jones replied.

The Court overruled the point reserved, and sustained the conviction.

[Prisoner's Attorneys, BERRANGE & DE VILLIERS.]

MACDONALD, TUTOR DATIVE OF PATERSON, vs. HUME.

Lease.—Sub-letting.—Ejectment for Breach of Condition.

An undertaking in a lease of a house not to sub-let unless in case of the lessee "leaving the town, and then only on the condition of his sub-letting the same as a private dwelling house," is a condition the breach of which entitles the lessee to re-enter. Held (FITZPATRICK, J., diss.) that the condition is not satisfied by compliance on the first sub-letting, but applies also to subsequent sub-letting.

1875.
Feb. 11.
" 16.
Macdonald,
Tutor Dative of
Paterson,
vs. Hume.

The plaintiff, as tutor dative of the minor children of John Paterson, sued the defendant in an action of ejectment to recover possession of a certain dwelling house and premises belonging to the minors, situated in Port Elizabeth.

The defendant pleaded the general issue, and then specially, first, that on the 4th January, 1873, the plaintiff leased the premises to one Bramson; that Bramson left the Colony in February, 1873, and thereafter in November, 1873, in terms of and in compliance of the condition and stipulations contained in the lease, Bramson sub-let to defendant, whereby defendant was now in lawful possession. Secondly, that the plaintiff had ratified and confirmed the agreement between Bramson and defendant,

The plaintiff replied generally.

The case was tried before Mr. Justice Dwyer on circuit, at Port Elizabeth, on the 19th November, 1874. It appeared

that the house in question was occupied by Bramson from January, 1872, without any written agreement. By the agreement of the 4th of January, 1873, the plaintiff agreed to let, and Bramson agreed to hire, "all that dwelling house and premises at present occupied by the said Bramson and known as Frances Place, to be occupied as a dwelling house only, for the space or term of five years, commencing from the 1st of Jan., 1872, upon the following conditions" (then, after providing *inter alia* for the payment of taxes and for the payment of rent at the rate of £180 per annum, payable quarterly, the instrument proceeded) the said Bramson "further agrees not to make any material alteration in the said dwelling house and premises, and not to sub-let the same, unless in case of the said Bramson leaving this town, and then only on condition of his sub-letting the same as a private dwelling house." In the early part of 1873, Bramson went to Europe, leaving his furniture in the house and sub-letting it to Mr. Wylde for a term of eight months. Bramson returned to Port Elizabeth in October, 1873, leaving his wife and family in England, and shortly afterwards entered into negotiations with Mr. John Paterson for an exchange in the occupation of their respective dwelling-houses, but, owing to some difference about furniture, these negotiations fell through. Thereupon Bramson took steps to obtain another house for himself, and succeeded in hiring one which he occupied together with Arthur Mosenthal, a clerk in the firm of which Bramson was a partner, who was the nominal tenant. Bramson, it was alleged, sub-let to defendant in November, 1873. With the exception of two months, viz., from December, 1873, to February, 1874, during which time he visited the Diamond-fields on business, Bramson remained at Port Elizabeth till October, 1874, when he left again for Europe. Before leaving he had notice of this action, and had indemnified defendant. His evidence was not taken for the purposes of the trial. The second special plea, that plaintiff had ratified the sub-letting, was wholly unsupported, besides being positively contradicted by the plaintiff. The learned Judge in the Court below gave judgment for the plaintiff with costs. From this decision the defendant now appealed.

Ross-Johnson (with him *Upington*), for the appellant, contended that the evidence showed that Bramson at the time he sub-let to defendant intended leaving Port Elizabeth, as in fact he had since done. This being so, he had a right to sub-let to Hume, who hired the premises as a private dwelling-house as stipulated for in the lease. But even if Bramson had not left Port Elizabeth, there would have been only a breach of covenant, not a breach in condition, and the

1875.
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" 16.
Macdonald,
Tutor Dative of
Paterson,
vs. Hume.

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" 16.

Macdonald,
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Paterson,
vs. Hume.

plaintiff had only an action for damages, not a right of re-entry.

Jacobs, A.G. (with him *Cole*), for the respondent, maintained there had been a clear breach of one of the conditions of the lease, so that the decision of the learned Judge below was correct.

Cur. adv. vult.

Postea (February 16th), the majority of the Court (*FITZPATRICK, J., diss.*) gave judgment for respondent, with costs.

DE VILLIERS, C.J., said:—On the question whether Bramson's undertaking not to sub-let unless in case of his leaving Port Elizabeth, amounts to a condition, the breach of which entitles the respondent to re-enter the house and premises, I am of opinion that this is one of the conditions upon which the respondent consented to let the premises to Bramson, and that, as it was introduced into the instrument for the benefit of the lessor, he is entitled to maintain an action of ejectment for a breach of the same. This condition, indeed, closely resembles that which was contemplated by *Voet* (19, 2, 5) in the following passage:—"Potest id pacto locationi adjecto agi, ut conductori non liceat alteri rursus elocare, adeo ut et lex commissaria recte apponatur, ut nempe res hoc ipso, quo per conductorem elocatur tertio, desinat locata esse, ac ad dominum ante finitum locationis tempus revertatur." I am further of opinion that there has been a breach of the condition that Bramson should not sub-let unless in case of his leaving town. His conduct shows that at the time when he underlet the house he had no immediate intention of leaving. In point of fact, he did not leave until the latter end of October, 1874, and then only, according to one of the witnesses, with the intention of visiting his family in Europe. From November, 1873, the date according to the appellant's plea of the under-lease, until October, 1874, Port Elizabeth was his place of residence with the exception of two months—viz., from December, 1873, to February, 1874, during which time he visited the Diamond-fields. It is to be regretted that Bramson, whose words, acts, and conduct constitute so material a portion of the evidence, and who has so serious an interest in the issue of the case, was not summoned as a co-defendant with the appellant. It was, however, admitted by the parties at the trial that he had notice of the action, and had indemnified the appellant in respect thereof. It was quite competent for him, upon receiving such notice, to apply for leave to intervene as co-

defendant; and as he did not think fit to take this course, I apprehend that this Court, as a Court of Appeal, should not disturb the judgment on account of an omission which was merely formal, and which has not even been urged as one of the grounds of appeal. (*Vide Voet*, 5, 1, 34, *et seq.*) As between the parties to this suit, it appears to me that the judgment of the Court below was correct and ought to be affirmed with costs.

DENYSSEN, J., concurred.

FITZPATRICK, J., said :—I regret I cannot agree with the rest of the Court. I consider the condition not to sub-let unless under given circumstances was removed by the first sub-letting to Wyld. Bramson did leave Port Elizabeth after so sub-letting, and thus complied with the condition. Even though he returned to Port Elizabeth, having left his wife and family in England, I look upon his return as only for a temporary purpose, and in fact he had left the Colony again before this action was tried. In my opinion, therefore, the judgment of the Court below ought to be reversed.

Appeal dismissed with costs.

[Appellant's Attorneys, FAIRBRIDGE & ARDERNE.]
[Respondent's Attorneys, REID & NEPHEW.]

SCLAVO vs. GOODLIFFE, SMART, AND SEARLE.

Charter-party: construction of.—Orders.—Freight.—Demurrage.

Where a vessel was chartered to convey a load of wheat and flour to Table Bay for orders, to discharge there "and" "or" at one other Cape port, orders to be given within forty-eight hours after arrival of vessel is reported, or demurrage to be paid, and provisional orders were given within the specified time to go into dock and discharge at Table Bay, but before the whole of the cargo was discharged the master was required to take part of the cargo to another Cape port, which he refused to do, but discharged the whole of the cargo at Table Bay,—Held (FITZPATRICK, J., diss.) that the Captain was bound to take so much of the cargo to the other Cape port as was on board when the order was received.

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Tutor Dative of
Paterson,
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SEMBLE,—*Demurrage is not claimable for delay arising from non-payment of freight.*

The defendants, a mercantile firm carrying on business at Cape Town, were summoned to answer the plaintiff, the

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master, and as such the agent for the owners, of the British barque *Columbia*, in an action of debt and for damages.

The plaintiff's declaration set forth that by a charter-party executed on the 24th July, 1874, at San Francisco, between the plaintiff of the first part, and the firm of Faulkner, Bell, & Co., of the second part, the *Columbia* was chartered to convey a cargo of flour and wheat to Table Bay for orders, to discharge there "and" "or" at one other Cape port, freight at the rate of £3 10s. 0d. per ton to be paid upon delivery. That the said charter-party contained the following stipulations:— "Orders to be given within forty-eight hours after master reports vessel's arrival to charter-agents at port of call, or demurrage to be paid." That a cargo of wheat and flour was duly and safely conveyed by the plaintiff to the port of Table Bay, where the same was, by the orders of the defendants, who were the agents of Faulkner, Bell & Co., and consignees of the cargo, landed, and was duly delivered or the delivery duly tendered to the defendants. That by reason thereof the plaintiff was entitled to receive from the defendants the sum of £1,675 11s. 2d. as freight. That the landing of the cargo was delayed by the neglect of the defendants to proceed with the same from the 9th December, when the landing might have been completed, until the 24th December, and that by the charter-party the plaintiff was entitled to £8 per day for each and every such day's detention, whereby the plaintiff was entitled to demand and have the sum of £120. That the plaintiff was also entitled to have and demand the further sum of £8 per day for each day during which his vessel shall be detained by reason of the neglect and refusal of the defendants to pay his aforesaid just demands. That the defendants were further indebted to the plaintiff in the sum of £17 6s. 1d. charges incurred in landing and discharging part of the cargo which the defendants failed or neglected to land. That the defendants were entitled to deduct the sum of £221 17s. 9d. being for certain commissions and payments made by them, leaving a balance due by them for freight of £1,470 19s. 6d., for which said sum and interest the plaintiff prayed judgment together with the sums due for detention.

The defendants admitted the capacity of the plaintiff and the due execution of the charter-party, and pleaded, first the general issue. Secondly, that pursuant to and in conformity with the said charter-party they ordered the plaintiff to discharge part of the cargo at Table Bay, and the residue at another Cape port, to wit, East London, but that the plaintiff refused to discharge any part of the cargo at East London; and that the defendants, although not legally compellable so to do, tendered and offered to pay the freight due for that part of the cargo which was to be discharged at Table Bay, and

they submitted that the residue of the freight was not due until the delivery of the rest of the cargo at East London. Thirdly, as to the claim for detention, that the vessel was not during the time for which demurrage was claimed, nor was she at the present time, in a seaworthy state or fit to proceed to sea, and that the vessel was detained for that reason, and not from any fault or act of the defendants. And in reconvention the defendants (now plaintiffs) alleged, that as agents of the charterers and as consignees, and pursuant to and in conformity with the charter-party they ordered the plaintiff to discharge part of the cargo at Table Bay and the residue at East London; and that the plaintiff refused to proceed to East London, but discharged the whole of the cargo at Table Bay, whereby the defendants were unable to deliver the said cargo at East London as they had agreed to do, and were forced and obliged to hire another vessel for the purpose of taking and conveying goods to perform their said agreement, and were put to great expense in and about the removing, storing, and transshipping of the said residue of the cargo, and sustained damage by reason of the delay, and were otherwise damnified to the amount of £576 10s. 10d., for which sum they prayed judgment.

The plaintiff excepted to the claim in reconvention as informal, vague, defective and insufficient, inasmuch as it did not state or specify the quantity of cargo the plaintiff was bound or was ordered to proceed with to East London; and inasmuch as there was no specific offence charged against the plaintiff, and that there were divers omissions of material statements and averments as to terms and quantities, and that the claim was otherwise drawn in a negligent and untechnical manner. The plaintiff further pleaded over generally.

(February 17th, 18th, 19th, 22nd, and 23rd).—The case was tried on the merits, when considerable evidence was led. It was proved that after the signing of the charter-party the vessel was duly laden with a cargo of wheat and flour, and sailed from San Francisco on the 15th August, arriving safely in Table Bay on the 20th November. The plaintiff reported his arrival to the defendants the same day, and asked for orders. Defendants said they could not then give definite orders as they had not received replies to telegrams sent to certain Eastern ports. Defendants stated that on the 21st November they told the plaintiff to go into dock and discharge part of the cargo. The plaintiff deposed he was not told to go into dock until the 23rd, and that he was then told to discharge the whole cargo. Defendants contradicted this, and stated positively that the words "part cargo" were

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used, and in addition that the plaintiff was told that he should be informed in due time what he was to do with the rest of the cargo. Plaintiff took the vessel into dock, but did not obtain a discharging berth for several days. About the end of the month the defendants intimated that they intended to send part of the cargo on to East London. On the 3rd December the defendants sent orders to stop discharging any more wheat. This was done, but the plaintiff continued discharging the flour. The next morning it was found there remained only 93 tons of wheat on board. On the 7th December plaintiff received a letter from defendants directing him to take on to East London 1,700 bags of flour and 2,489 bags of wheat. The plaintiff declined, contending that he was not required so to do by the charter-party. The defendants offered to pay the expense of reshipping the cargo, but plaintiff refused to take it. He then landed the rest of the cargo, and thereby incurred the charges mentioned in the declaration. The vessel would have required ballasting before she could have gone to sea with only 93 tons of cargo on board. The defendants afterwards sent the part of the cargo by another vessel to East London to complete contracts entered into by them.

Cole (with him *Upington*), for the plaintiff, contended that the freight had been properly earned. Orders had been given within 48 hours after arrival, as required by the charter-party, to discharge cargo, and it was not competent to defendants afterwards to change those orders. The condition as to demurrage did not entitle defendants to delay giving orders, which under any circumstances must have been given within a reasonable time. The plaintiff was not bound to go to sea unless sufficient cargo was left on board to ballast the vessel, and if cargo was once landed the master could not be compelled to reload. (*Woolley vs. Redding*, 5, *M. & G.*, 316; *Worms vs. Storey*, 11, *Exch.*, 427.)

Jacobs, A.G. (with him *Maasdorp*), for defendants, admitted that had final orders been given within forty-eight hours such orders could not afterwards have been varied, but in this case the plaintiff was told from the first he would have to take part of the cargo to another port. The charter-party was clear that the plaintiff might be ordered to deliver the cargo partly here and partly at East London, and nothing had been shown to relieve him of that liability. The meaning of the clause that orders were to be given or demurrage paid was simply that the vessel was not to be kept idle. As to the question of ballast, it was the duty of the shipowner to ballast his vessel properly (*Irving vs. Clegg*, 1, *Bing.*, *N. C.*, 53).

Cole replied.

DE VILLIERS, C.J.:—I am of opinion that the defendants' evidence as to the exact orders which were given to the captain is the more probable and more fortified by all the surrounding circumstances of the case. If this question of fact was decided in favour of the plaintiff there would be an end to the case for the defendants, because if a final order was given to plaintiff to discharge his whole cargo in Table Bay, I do not think that under this charter-party the defendants could subsequently vary this order by afterwards telling the plaintiff to discharge part of his cargo at East London. On the 20th November defendants were in communication with Eastern ports as to the disposal of part of the cargo and told the plaintiff so. On the 30th November defendant Searle told the plaintiff that some of the wheat and flour would have to be sent to East London. On the 3rd December in consequence of telegrams received, the defendants sent down to the docks an order to stop the discharge of any more wheat. I can quite understand why an order was not sent to stop more flour being landed, because the defendants did not believe the vessel was discharging so fast as was the case. The plaintiff, acting on the strict letter of the order, stopped discharging wheat, but went on with the flour. Next morning there were only about nine broken bags of flour remaining on board; and but 93 tons of wheat. The question then comes, was not the plaintiff bound under the terms of the charter-party to take on these 93 tons of wheat to East London? I am decidedly of opinion that he was so bound. There was nothing unreasonable in the order. The plaintiff however refused to take any portion of the cargo to East London. Under these circumstances I certainly think the defendants are entitled, under their claim in reconvention, to be paid their costs and expenses in carrying the 93 tons to East London. If this view is correct, it would follow that no claim for demurrage can arise for the delay in landing between the 9th and 24th December. As to the claim from the 24th December to the present time, not a single case has been quoted in which demurrage has been claimed or allowed for detention arising from non-payment of freight. There may be cases, and I do not decide the point as at present advised. Judgment in my opinion should be for plaintiff for the full amount of freight less the costs and expenses of carrying the 93 tons from Table Bay to East London. As to costs, the defendants certainly never tendered the amount of freight for all the cargo landed except the 93 tons, but the question is were they bound to tender any portion of it until the true and faithful delivery of the whole cargo in terms of the charter-party? In *Brown vs. Tanner*, 37, L. J., n. s., *Equity*, 923, it is

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decided that the freight upon a charter-party is not earned until the unloading and delivery of the whole cargo has been completed. In the present case the charter-party expressly provides that the freight shall be payable on the true and faithful delivery of the cargo. Can there be said to have been such true and faithful delivery when the master never obeyed the instructions which according to my view he ought to have obeyed, namely to go to East London with the remainder of the cargo? I am therefore bound by the authorities to conclude that the fact of the defendants not having tendered the freight does not now debar them from obtaining their costs, under the ordinary rule that the suitor who substantially succeeds in his cause ought to have his costs.

DENYSSEN, J.:—I am of the same opinion as the Chief Justice. The plaintiff was bound to deliver at East London the cargo which remained on board on receiving orders so to do. The consignees, however, could not have compelled him to reship any portion which had already been landed.

FITZPATRICK, J.:—I am sorry I cannot agree. I consider that when the plaintiff chartered his vessel at San Francisco there was a contract made, the provisions of which ought to have been strictly fulfilled. One of the stipulations of his contract was that he should come to Table Bay for orders, and discharge his cargo there "and" or "at" some other port in the Cape of Good Hope; "orders to be given within forty-eight hours after master reports vessel's arrival at port of call, or demurrage to be paid." The first question I asked myself was, is that such an unreasonable condition that it ought not to be construed according to the ordinary meaning of the words in the English language? The charterers stipulate that definite orders shall be given to the master within forty-eight hours after he reports himself. Is that an unreasonable stipulation? I do not think so, and I am sure the persons who chartered the vessel were of the same opinion when they entered into the contract. The captain accordingly comes to Cape Town and at once on his arrival in Table Bay he reports himself to the defendants. This is on a Saturday, and he is told to call again on Monday. He calls and is told to bring his vessel into dock and to discharge cargo, the defendants say a "part," but he says "the whole." It is unnecessary to impute want of veracity to either party. I maintain that the captain getting an order to go into dock and discharge cargo is entitled, if he can, to discharge within one hour every pound of cargo in his vessel, and to say, "I have done my duty. I have complied with the terms of my charter-party. Pay me my

freight, if not I claim demurrage." But supposing the order was not simply to go into port and discharge, but it was to discharge a portion of the cargo as asserted by the defendants. I maintain that the captain was not bound to wait for a second order, but was entitled to act upon the first order and discharge all his cargo, no other order having been given to him within the stipulated limit of forty-eight hours. Mr. Searle said it was on the 21st November he told the captain to go into dock, and the 28th was the first day he told him absolutely he had to go on to East London, and Mr. Searle claims that they were entitled thus to vary the order. This was the construction the consignees put upon the charter-party; but with every respect for their experience I think it a grossly incorrect one. From the great pressure of business, I am sorry I am not able to fortify my judgment with many authorities, but in *McLachlan on Shipping* I find the general rule to be adopted in the construction of this and other mercantile instruments laid down to be, "that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, or of the particular trade to which the contract relates." If, then, there was any absolute usage or law of this port which could have varied the written words of this contract, the defendants were at liberty to have given evidence of it. But no evidence of any such usage has been given, and I have consequently to interpret the contract according to the best light afforded me, namely, the plain and ordinary meaning of the language used as indicating the intention of the parties. My opinion is that the intention of the parties was that within forty-eight hours after arrival the captain was entitled to know definitely where he was to discharge his cargo. I do not think a merchant has a right to say to the captain, "come into dock and discharge a portion of the cargo," without specifying what portion he is to land and what to retain. Under all the circumstances, I must differ from the judgments that have been pronounced. I base my decision entirely on the contract contained in the charter-party. By that contract the consignees were bound to give final orders on the captain's arrival in Table Bay, orders which were to be final and complete. The captain did get such orders when he was told to go into dock and discharge cargo. But even if the orders were intended to apply only to part of the cargo, the captain was entitled to act upon them without waiting the pleasure of the consignees while they were finding out the best port for disposing of the cargo.

Judgment accordingly for the plaintiff for the freight

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claimed, less the costs and charges incurred by the defendants in forwarding the 93 tons of cargo to East London; plaintiff to pay the costs of the action.

[Plaintiff's Attorneys, REID & NEPHEW.
[Defendants' Attorneys, FAIRBRIDGE & ARDERNE.]

JONES vs. BORRADAILE, THOMPSON, HALL, & Co.

Practice: notice to plead.—Rule of Court No. 19.

After the filing of plaintiff's declaration, written notice must be given to defendant to plead, answer, or except thereto. A verbal notice is insufficient.

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The plaintiff had been served with notice, calling upon him to show cause why the above case should not be taken off the roll, the trial thereof postponed. the defendants allowed to plead, and the plaintiff condemned to pay the costs of the application, for the following reasons:—First, that the defendants had never received notice to plead, answer, or except to plaintiff's declaration, as required by the 19th Rule of Court, and therefore it was not competent to the plaintiff to set the case down for trial for default of plea. Second, that the principal witness for the defence was absent from the Colony.

Jacobs, A.G., for the defendants, put in affidavits in support of the averments of the notice.

Cole (with him *Kotze*), for the plaintiff, read the affidavit of Mr. Arderne, stating that he had served a written notice on defendants' attorney, informing him that the declaration had been filed; and at the same time gave the following verbal notice:—"Mind, let there be no delay, for we shall proceed to bar you as soon as the required eight days have expired, for our clients expect the case to be tried this term." Also the affidavit of Mr. Fairbridge, stating that the summons had been issued before defendants' witness had left the Colony, and that no intimation thereof was given to plaintiff or application made to have his evidence taken *de bene esse*, as might have been done. Counsel produced copies of notices in general use among the practitioners of the Court, all of which were similar in form to the one served in this case; and urged that it was sufficient to give verbal notice to plead, answer, or except.

The Court held that the notice given was not sufficient under the Rule, and ordered the case to be struck off the roll, with costs of this motion. Leave was also given to the defendants to plead.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.]
[Defendant's Attorney, TREDGOLD.]

BUYSKES vs. RUSSOUW'S EXECUTORS.

Legitimate portion.—Ante-nuptial contract.

Where a child has, on marriage, during her father's lifetime, by ante-nuptial contract settled all her property in possession and expectancy upon trusts, she is not entitled on the death of her father, to claim that her legitimate portion out of his estate shall be paid to her individually; but such portion must be paid over to the trustees under the ante-nuptial contract.

The executors of the late G. J. Russouw were summoned to answer Johanna Francina Vos Russouw (married out of community of property to, and duly assisted by her husband, J. J. Buyskes), in an action to declare her entitled to be paid her legitimate portion out of the estate of her father, the said late G. J. Russouw.

The declaration set forth that by the last will of the said G. J. Russouw, the plaintiff was instituted as one of his sole and universal heirs, but that the will directed that plaintiff's inheritance should be paid to certain trustees, and otherwise burdened with certain trusts and conditions. That the plaintiff, as a child of the said G. J. Russouw, was entitled to demand and receive free and unencumbered her legitimate portion out of her father's estate, and without thereby forfeiting any right to the other gifts and benefits given and bequeathed by the will, but that the defendants refused to pay her such legitimate portion, wherefore she brought her action.

The defendants pleaded first, generally to plaintiff's claim; and then specially, that before the execution of the will aforesaid and before the plaintiff's marriage, an ante-nuptial contract was entered into between her husband and the plaintiff, duly assisted by her father and natural guardian, whereby *inter alia* it was provided that all property and effects of which the plaintiff was then possessed, consisting of her maternal inheritance, and all such other inheritances, legacies, and acquisitions as might in future devolve upon her, should be and remain vested in the hands of her father as her trustee, and after his resignation, mental incapacity, or death, under the administration of the Board of Executors, as the sole, separate and exclusive property of the plaintiff, upon the trusts in the ante-nuptial contract mentioned.

All the facts were admitted. From the ante-nuptial contract it appeared that the plaintiff was a minor at the time of her marriage.

Buchanan, for the plaintiff, prayed for judgment. He

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contended that it was clear law that a child's legitimate portion must be left absolutely free and unincumbered. The plea was to the effect that the plaintiff had renounced her right. This could not be done. The effect would be that a parent could by means of an ante-nuptial contract bind the future rights of a minor as to her legitimate portion.

Jacobs, A.G. (with him *Upington*), contra, argued that the plaintiff was bound by her contract. That her father was her guardian was an accident. The plaintiff had clearly settled her present and future property, and the legitimate portion inherited out of her father's estate was clearly included in the contract.

DE VILLIERS, C.J.:—The question in this case is simply whether Russouw's executors are bound to pay over plaintiff's legitimate portion to her trustees under her ante-nuptial contract, or to pay it over to plaintiff herself. The inheritance clearly comes within the description of the property affected by the contract. The only doubt I had was whether a contract of this kind can hold good, as being an alienation of plaintiff's claim to her legitimate portion. The Roman-Dutch authorities lay down the doctrine that a person cannot renounce his right to the legitimate portion. *Voet* mentions one exception to this and one only, and that is this very case of an ante-nuptial contract. He gives as the reason for this exception that parents would rarely consent to the marriage of their children unless their property was secured. (*Vide Sande*, 4, 2, 4; *Voet*, 5, 2, 36.)

Judgment accordingly for defendants; the inheritance to be paid over to the trustee under the ante-nuptial contract. Costs to come out of the estate.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.
Defendants' Attorneys, BERRANGE & DE VILLIERS.]

HAMILTON ROSS & CO. vs. DONALD CURRIE & CO.

Bills of Lading.—Delivery of Goods.

A ship-owner cannot insist that Bills of Lading shall be given up before delivery is made of the goods to which they refer.

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Donald Currie, of London, trading under the style or firm of Donald Currie & Co., represented in this Colony by his lawful agents, Messrs. Anderson and Murison, was summoned to answer the plaintiffs in an action for the recovery of certain goods or their value, and for damages for loss of market occasioned by their detention.

The declaration set forth that certain goods of the plaintiffs were shipped at London on board the steamer *Edinburgh Castle*, of which the defendant was the owner, for which goods bills of lading were signed, promising to deliver the same to plaintiffs at Table Bay; and that certain other goods were in like manner shipped at Port Natal on board the steamer *Florence*, also to be delivered at Table Bay. That though the said steamers had duly arrived at Table Bay, and all conditions had been performed, and all times elapsed to entitle the plaintiffs to have the said goods delivered to them, yet the defendant refused to deliver the same; and by reason of such refusal the plaintiffs had suffered £50 damages from loss of market, for which sum, and the delivery of the goods on the value thereof, amounting in all to £314 9s. 11d., the plaintiffs prayed judgment with interest and costs.

The defendant pleaded first, the general issue; and secondly, that he was always ready and willing, and before action tendered and offered and now again tendered and offered to deliver to the plaintiffs the goods mentioned in the bills of lading, on the plaintiffs delivering up the bills of lading to the defendant at the time of the receipt and delivery of the goods.

The replication was general.

The issues in this case were raised mainly on documentary evidence and correspondence. The bills of lading were in the ordinary form, and executed in sets of three. The plaintiffs applied for the goods in question, presenting the bills of lading. Defendant's agents would not give an order for the delivery of the goods unless the plaintiffs gave up the bills. The agents had shortly before published a notice requesting consignees to hand in to them at their office their bills of lading, upon receipt of which the agents would issue orders for the delivery of the goods. The plaintiffs refused to give up their bills, but offered on receipt of the goods to endorse a receipt and discharge on the captain's copy. The plaintiffs claimed the right to retain their copies of the bills as being the best evidence of their title to the goods, or for use in case they required to have recurrence on the ship should any of the goods be found damaged. The defendant's agents positively refused to deliver the goods before obtaining possession of the bills of lading. A number of witnesses were examined with the object of proving that the custom at this port was for the consignee to retain possession of the bills of lading.

Upington (with him *Tennant*), for the plaintiffs, submitted that the onus lay on the defendant to show why he should not deliver the goods in terms of his contract. The consignee was certainly not bound to deliver up possession of the bill

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of lading before he received his goods as had been claimed by defendant's agents. The contract between the parties was one of bailment, and the consignee was entitled to keep his bills of lading as evidence of the contract. The master of the vessel had one copy of the bills, upon which he could obtain the consignee's receipt. The custom of the port also was against the claim set up by the defendant. (*McLachlan on Shipping*, p. 338; *Peake on Marine Insurance*, p. 859; *The Tigress*, 32, L. J., Adm., n. s., 97; *Barber vs. Taylor*, 5, M. & W. 527; *Meyerstein vs. Barber*, 2, L. R., C. P., 38.)

Buchanan (with him *Jones*), for the defendant, contended that the plaintiff was not entitled to retain the bills of lading, but was compellable to deliver them to the shipowner on receipt of the goods named therein. A bill of lading was a negotiable instrument, and on analogy to bills of exchange or promissory notes, delivery of the document should be made on its being satisfied. The defendant had before action tendered the goods on receipt of the bills of lading and had pleaded his readiness still so to do. (*Maude and Pollock on Shipping*, 3rd ed., p. 257; *Abbott on Shipping*, 11th ed., p. 452; *McLachlan on Shipping*, p. 341; *Byles on Bills*, 9th ed., p. 222.) *Uppington* replied.

Cur. adv. vult.

Postea (February 27th),

DE VILLIERS, C.J., in delivering the judgment of the Court, said:—The sole question for the Court to consider is, whether the plea of tender has been proved by the defendants or not. On going through the evidence it seems clear to me that the position taken up by the defendants is this, that they refuse to deliver up the goods until they first get possession of the bills of lading. This position is perfectly clear from the several documents which have been put in and from the evidence of the witnesses. I am of opinion that this position cannot be maintained even taking the analogy of bills of exchange. It has been argued on behalf of the defendant, that bills of lading stand on the same footing as bills of exchange. Even if that is correct, the holder of a bill of exchange cannot be compelled to deliver it up to the acceptor unless the full amount has been paid over to him, and then only is the acceptor in a position to demand the bill. If that analogy holds, in the same way a bill of lading can only be required after the goods have been delivered up. On this simple ground, therefore, I am of opinion that the plea of tender has failed, and that there ought to be a judgment for the plaintiffs for the goods, and

for £20 damages for non-delivery. A great deal of evidence has been led as to the custom of the port, but it is unnecessary now to decide that question.

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Judgment accordingly for plaintiff for the delivery of the goods, and £20 damages, and costs.

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[Plaintiffs' Attorneys, FAIRBRIDGE & ARDERNE.]
[Defendant's Attorneys, REID & NEPHEW.]

MOSTERT vs. FULLER. .

Pleading.—Tender.—Assault.—Criminal prosecution.

Where the defendant to a claim for damages for an assault, pleaded the general issue, then a plea of estoppel, and lastly, a tender, HELD, that the defendant, having availed himself of a legal defence, could not, on failure of such defence, rely on the tender made, and so escape the payment of costs.

A criminal prosecution for an assault is no bar to a civil action for damages.

This was an action for £500 damages for an assault committed by the defendant on the plaintiff.

The defendant pleaded first, that except as hereinafter mentioned, the general issue. Secondly, that after the committing of the alleged grievances and before action brought, the plaintiff summoned, or caused to be summoned, the defendant before the Resident Magistrate of Worcester, to answer the plaintiff in a criminal prosecution in which in his own name and on his own behalf the plaintiff prosecuted the defendant for the committing of the same identical assault; and that the defendant was found guilty and sentenced to pay a fine of £3 or in default to suffer imprisonment for forty-eight hours, which fine was duly paid by the defendant and so the said judgment was satisfied; by reason of which proceedings and of the election of the plaintiff so to sue and prosecute the defendant the plaintiff was now barred and estopped from having or maintaining this action. And thirdly, that before action brought the defendant tendered and offered to pay in satisfaction of the damages suffered by plaintiff, the sum of £75 sterling, which sum he again tendered and offered to pay, wherefore he prayed judgment with costs.

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Plaintiff's replication took exception to the second plea, and otherwise joined issue generally.

The case was heard on the merits.

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Jacobs, A.G. (with him *Jones*), for the plaintiff, led evidence showing that a severe assault had been committed, and proved special damages. The Clerk of the Resident Magistrate stated that the summons in the criminal proceedings, though in the form set out in defendant's second plea, had been issued at the public instance, and that the fine paid by defendant had been accounted for to Government.

Cole (with him *Buchanan*), for the defendant, proved the tender; and argued that the plaintiff was estopped by the criminal proceedings instigated by him (*Russouw vs. Sturt*, 1, *Menz.*, 378). Further, that if plaintiff was not so estopped, the tender made by defendant before action was ample, and entitled defendant to his costs.

Jacobs, A.G., replied.

The Court held that the plaintiff was not estopped from bringing this action in consequence of the criminal proceedings. That though the tender was nearly sufficient, and probably equal to the amount of damages the Court might have awarded, yet that as the defendant had not relied solely on the tender but had availed himself of every defence he could, the effect of tender before action had been destroyed.

Judgment therefore for plaintiff, for £80 damages and costs.

[Plaintiff's Attorneys, BERRANGE & DE VILLIERS.]
[Defendant's Attorney, I. HORAK DE VILLIERS.]

SCHLECHTING vs. SCHLECHTING.

Marriage Order in Council, secs. 2, 18.—Marriage by a Missionary.—Divorce.

Semble,—*An unordained Missionary, set apart by the Presbytery of the Dutch Reformed Church to preach the Gospel among the heathen, is not a Minister within the meaning of section 2, of the Marriage Order in Council, of 1st February, 1839, authorized to publish banns and solemnize marriages.*

In an action for divorce, the marriage having been solemnized by such unordained Missionary, the Court granted a decree of dissolution of the bonds of marriage, as there was sufficient evidence given of the marriage for the purposes of the action, regard being had to the provisions of the 18th section of the said Order in Council.

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This was an action for divorce on the ground of adultery, brought by the husband against the wife. Pleadings had

been filed by default, but the defendant appeared in Court at the trial in person. The parties had been married on the 16th August, 1869, and it was proved by several witnesses that they had since then lived together as man and wife. In September last, the defendant left her husband's house and had since cohabited with another man. The Rev. D. J. H. Ruytenbeek was called for the plaintiff, and stated he had married the parties. He had not been ordained, but had been set apart for missionary work with the formalities usually adopted by the Dutch Reformed Church.

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The Court granted the decree for divorce, subject to it being shown that the marriage had been a valid one.

Postea (February 17th, and 23rd),

Maasdorp, for the plaintiff, referred to the rules of the Dutch Reformed Church, and submitted that as Mr. Ruytenbeek had been "set apart" for the ministry by that church, he was authorized, under the second section of the Order in Council, to celebrate marriages, in the same way as could "proponents," or elders, of that church. Ordination was necessary to enable the minister to administer the Sacraments, but marriage was not considered a Sacrament by the Dutch Reformed Church. In the Episcopal Church a deacon could solemnize marriages, but could not administer the Sacrament. As to the usages of the Dutch Reformed Church he called the following evidence:—

Rev. Philip Edward Faure, D.D., who stated:—I am a minister of the Dutch Reformed Church at Wynberg, and am also Moderator of the Synod. Mr. Ruytenbeek is working as a missionary in my parish, and as such from time to time celebrates marriages. He is not ordained. He is "set apart" by the Presbytery of Cape Town as a minister to preach the Gospel among the heathen. He is licensed under the 184th article of the Church Regulations. I consulted the late Attorney-General, Mr. William Porter, when Mr. Ruytenbeek came as a missionary to Wynberg, and in consequence of his opinion, Mr. Ruytenbeek has for the last twelve or fifteen years officiated at marriages, sometimes in my presence and sometimes in my absence. An unordained missionary "set apart" to preach the Gospel has not a full ministry; he requires a call, and then he is ordained. Marriages are celebrated by licentiates of our church who are not ordained.

Rev. William Robertson, D.D., who stated:—I am a minister of the Dutch Reformed Church and am also the Scriba, or Secretary to the Synod. A man holding the rank

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of a missionary may be appointed to a coloured congregation, though not ordained, and may preach the Gospel and publish banns and marry the members of that congregation. He is "set apart" for the ministry of the Christian religion in as much as he preaches the Gospel. He cannot administer the Sacraments unless he is ordained. Marriage is not looked upon as a Sacrament in our Church. A man is not fully "set apart" unless he is ordained.

Cur. adv. vult.

Postea (March 5),

DE VILLIERS, C.J., said:—By the law of this Colony marriage can be solemnised only by the following classes of persons:—(1) Ministers of the Christian religion ordained or otherwise set apart to such ministry according to the usage of the persuasion to which they may belong. (2) Marriage Officers appointed under 12th section of the Marriage Order in Council and the 4th section of Act No. 16 of 1860; and (3) Resident Magistrates. By the common law of this Colony and by the law of England strict proof of marriage is required before the Court can grant a decree of divorce. The necessity of such proof arises not only from the fact that marriage is an essential ingredient in the offence of adultery, since the violation of matrimonial duty cannot take place where the matrimonial relation does not exist, but likewise from the consideration that as divorce is the dissolution of this relation, if there is no relation subsisting, there is nothing for the divorce to act upon. If, therefore, this case had to be decided under the common law, this Court would have been bound to withhold the decree inasmuch as it has not been proved that the marriage was solemnised by a person falling under any of the three classes. But by the 18th section of the Order in Council it is enacted that "after the solemnisation of any marriage under or by virtue of that Act it shall not be necessary in support of such marriage or in any action, suit, or proceeding when the same may come into question, to give any proof that the banns were published or that the marriage was solemnised in the place and by a person where and by whom the same ought to have been published and solemnised respectively, nor shall any evidence be received to prove the contrary." Accordingly we find that in cases of divorce decided by the Supreme Court subsequently to the Order in Council, the Court did not insist upon the same strictness of proof as formerly. In the case of *Hoffmann vs. Hoffmann* (12th June 1847, 1, *Menz.*, 281) proof that the witness saw the parties go into the church

to be married in their wedding clothes and saw them return out of church together, and that the witness went into church immediately after them to be married, and was married by the new minister of the Dutch Reformed Church, and that the parties thereafter lived together as husband and wife for many years, was held sufficient *prima facie* evidence to support an action for divorce on the ground of adultery. And in the later case of *Kemball vs. Kemball* (8th February, 1848, 1, *Menz.*, 281) proof that the parties had lived together as husband and wife, that the husband had paid rent for a house occupied by them, and had made a claim for the price of a gown sold by the wife, was held sufficient evidence of marriage to support the action. The difficulty in the present case is that the plaintiff himself called Mr. Ruytenbeek as a witness to prove that he was the person who solemnised the marriage. The difficulty, however, may be removed by striking out this part of the evidence, for there will still remain sufficient proof that the marriage purported to be solemnised under the Order of Council, and that the parties for some time afterwards lived together, and were recognised by their friends and relatives as husband and wife. On this ground, and on this ground only, I am of opinion that there is sufficient proof of marriage to justify the Court in granting a decree of divorce. I trust that what has occurred in the course of this case may be the means of directing public attention to the necessity of some reform of the marriage laws of the Colony. Where the marriage is a purely civil one, or where it is solemnised by a Marriage Officer appointed by the Governor, there is some guarantee that this important function is performed by a responsible officer. In the former case the Resident Magistrate is entrusted with the duty, and in the latter case the Governor must be satisfied that the person appointed is a fit and proper person for the performance of the duty. So also in the case of the greater number of the religious denominations in the Colony, there exists little probability that persons unfit to exercise the function of joining others in matrimony would be ordained or set apart as ministers. But cases have arisen, and may again arise, where persons claim and exercise the right of solemnising marriages, and receiving fees for so doing, who have no other title to be considered as set apart to the ministry than that they have thought fit to set themselves so apart. The evil is a practical one, and one which this Court, as the upper guardian of minors, is bound to notice. There is but too much reason to fear that in some cases minors have been married by such irresponsible persons without the consent of their parents or guardians, or of the Chief Justice, and that in other cases widows and widowers, having minor children

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by a former marriage, have been married without the production of the proper certificate that the paternal or maternal portions of such children have been duly secured by means of a kinderbewys. The law clearly forbids such marriages, but as there is no penalty attached to its breach, there exists no guarantee for its observance. In making these observations, I wish it to be understood that no reflection is intended to be cast on Mr. Ruytenbeek. It was only after taking the best legal advice, and with the most laudable intentions, that he was allowed to solemnise marriages during the absence of the minister: nor is there anything to show that he was unfit for the duty. It is to be regretted, however, that no application was ever made to the Governor for his appointment as Marriage Officer, for if such an appointment had been made no doubts could ever have arisen among those whom he has joined in matrimony as to the legality of their marriage.

DENYSSEN, J.:—I am of the same opinion that the divorce must be decreed in terms of the prayer in the declaration. There is, upon the authorities referred to by the Chief Justice, sufficient evidence to show that these parties have lived together as husband and wife. For the purpose of testing the validity of the marriage, in my opinion a special plea of not having been duly married should have been made. This not having been done, however, the question has not been raised on the record. At the same time, I wish it to be distinctly understood that I give no expression of opinion with reference to what is contained in that section of the Order in Council about persons “set apart” for the ministry, a matter which I think requires the attention of the Legislature as it is one of great importance to the community.

FITZPATRICK, J.:—I wish to be relieved from giving any judgment whatever upon this case. The legal question which has been raised is one too serious and important not to be argued more fully than has been done. The evidence which has been led shows that Mr. Ruytenbeek, the missionary who officiated, was not properly authorized as a Marriage Officer. I feel the responsibility of interfering in this matter would be too great for me to take upon myself, and therefore I decline to give any judgment.

Divorce decreed.

[Plaintiff's Attorneys, BERRANGE & DE VILLIERS.]

LONDON AND SOUTH AFRICAN BANK *vs.* DONALD
CURRIE & Co.

Bill of Lading.—Delivery of Goods.

Where a Bill of Lading made goods deliverable "to order," and the goods were delivered at the port of destination, but without the production of the Bill of Lading, to the person for whom they were shipped, the ship-owner held liable for the value of the goods, at the suit of the endorsee and holder of the Bill of Lading.

The holder of a Bill of Lading has such a special property in the goods named therein as to entitle him to bring an action for their recovery, without proving that he gave value for the Bill of Lading.

Donald Currie, of London, trading under the style or firm of Donald Currie and Company, the defendant, duly represented in this Colony by his lawful agents, Messrs. Anderson and Murison, was summoned to answer Alfred George Jones, as manager of the Cape Town Branch of the London and South African Bank, the plaintiff in this suit, in an action for the recovery of certain goods or their value.

Plaintiff's declaration set forth that by a bill of lading made by the defendant through his agent or servant John Howson, as Captain of the steamer *Windsor Castle*, on the 19th October, 1874, and delivered to H. & D. Sharpe, of London, the defendant acknowledged certain goods of the said H. & D. Sharpe, to wit, 27 cases of port wine, and 26 cases of sherry, to have been shipped in good order on board the said *Windsor Castle*, of which the defendant was the owner, and thereby promised the said H. & D. Sharpe that the said goods should be delivered at Table Bay unto order or their assigns; and the said H. & D. Sharpe endorsed and delivered the said bill of lading to the said London and South African Bank, at the Cape Town Branch, and the property in the goods thereby passed to the plaintiff in his said capacity, who was now the lawful holder of the bill of lading. That although all conditions had been performed and all periods of time elapsed, yet the defendant had refused to deliver the goods, which were of the value of £55, wherefore the plaintiff prayed judgment, with interest and costs.

The defendant pleaded, first, the general issue; and then specially, admitting the receipt of the goods, that the *Windsor Castle* arrived at Table Bay on the 2nd December last,

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and that the goods were landed by the agents of the owners of the vessel at the expense and risk of the consignees thereof ; and that on the 7th December the goods were delivered to the rightful and lawful owner, namely A. E. G. von Buettner, to whose order and for whose account and risk the goods were shipped in London.

The replication was general.

From the evidence it appeared that Von Buettner, who traded as a wine merchant under the style of Von Buettner & Co., ordered some wine through H. & D. Sharpe, of London, who in the execution of that order shipped the goods now in question on board the *Windsor Castle* on the 19th of October, 1874, and by the same ship sent a letter to Von Buettner, which, after advising him of the shipment, continued : " We enclose copy of invoice amounting to £53 5s. 5d. to your debit. On the other hand we credit you for our draft of £55 at 30 days' sight, order of the London and South African Bank, from whom you will receive bill of lading and invoice of the goods." The invoice enclosed in the letter was headed thus : " Invoice of wine shipped to Cape Town by *Windsor Castle*, consigned to order, by order and for account and risk of Messrs. Buettner & Co." The bill of lading was made out in three parts in the usual form, and contained a proviso that " the cargo, if not taken out on the day of arrival, may be landed by owner's agents at the expense and risk of consignee." One part of the bill of lading was retained by the shippers, and the remaining two were handed over, duly endorsed by them, to the London and South African Bank in London, together with a bill of exchange at thirty days' sight, drawn by the shippers upon Von Buettner & Co. The plaintiff stated that this bill was discounted by the London office of the Bank, founding the assertion on the fact that the bill bore on the face of it the stamp of the Bank's London office. By the letter enclosing the drafts and bills of lading to the London office the shippers wrote as follows : " We will thank you to deliver " the invoice and bills of lading " to Messrs. Buettner & Co., against payment of the enclosed draft on them for £55 at thirty days' sight. In case of non-payment of the bill please take charge of the goods for our account." On the 24th November the bill of exchange was accepted by Von Buettner & Co., but the bills of lading were retained by the plaintiff. On the 2nd of December the *Windsor Castle* arrived in Table Bay, and the goods in question were stored by Anderson & Murison, the defendant's Cape Town agents, in a temporary warehouse hired by them from the Customs authorities. On the 5th of December a dock agent employed by Von Buettner applied to the locker, who had charge of

the warehouse, for the goods, and upon the production of the invoice and of proof that the Customs and dock dues had been paid, the goods were handed to him, and by him delivered to Von Buettner & Co. It appeared that it was not unusual for this officer to deliver up goods without production of the bill of lading, and that Von Buettner himself had on previous occasions under similar circumstances received goods without the production of the bill of lading, but the plaintiff stated that this had been done without his knowledge. On the 24th December the bill of exchange was presented for payment and dishonoured. On the same day the accountant of the Bank presented the endorsed bill of lading to the locker and asked for the goods, but was informed that the goods had been delivered to Von Buettner. Von Buettner died about the end of December, leaving his estate hopelessly insolvent. The plaintiffs placed the matter in the hands of their attorneys; but no formal demand was made on the defendant's agents until the 19th of January, 1875, when the attorneys demanded payment of the value of the goods. A correspondence then ensued between the parties which resulted in the present action.

Cole (with him *Upington*), for the plaintiff, contended that the Bank, as the holder of the endorsed bill of lading, were entitled to receive the goods mentioned therein. Though the goods had been shipped for Von Buettner, Messrs. Sharpe had retained the *jus disponendi* by taking the bill of lading "to order," as security for the draft drawn against the shipment, and no property passed until payment had been made. Valid delivery could be made only to the holders of the bill of lading. (*Turner vs. Trustees Liverpool Dock*, 20, L. J., Exch., 393, *McLachlan on Shipping*, 371.)

Buchanan (with him *Jones*), for the defendant, submitted that the property in the goods was intended and had vested in Von Buettner subject to any right Messrs. Sharpe might have of stoppage *in transitu*; and delivery having been made to the real owner, the shipowner was no longer responsible. The evidence showed that in previous transactions Von Buettner had been allowed to take goods shipped for him without receiving from the Bank the bill of lading. (*Abbott*, p. 292.)

Cole replied, and cited *Cox vs. Harden*, 4, East, 211; and *Meyerstein vs. Barber*, 2, L. R., C. P., 38.

Judgment was deferred until after the case of *Hamilton Ross & Co. vs. Donald Currie & Co.*, supra, p. 20, had been heard.

Postea (March 8), the judgment of the Court was delivered by,—

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DE VILLIERS, C.J., who, after reciting the facts, said:—
It is impossible to consider the evidence in this case without being struck by the want of due diligence on the part of the plaintiff in his dealings with the defendants' agents. Although he had received the bills of lading as far back as the 24th of November, and although he knew on the 24th of December that the goods had been delivered to Von Buettner, he gave no formal notice to the defendants of the fact that the bill of lading had been endorsed to him until the 19th of January, 1875. Although Von Buettner had on previous occasions obtained goods shipped under exactly similar circumstances, the plaintiff appears to have made no inquiries between the 2nd December (the date of the arrival of the *Windsor Castle*) and the 24th of December, to ascertain (if indeed he did not know the real fact) whether the goods were still in the safe custody of the defendants. On the other hand, one is equally struck with the negligence of the defendants' agents, Messrs. Anderson & Murison. They knew, or must be presumed to have known, that the bill of lading signed by or for the captain of the *Windsor Castle* was made to order, and that a delivery made to any one other than the person indicated in the bill of lading would be an improper delivery. Notwithstanding this, they store the goods in the Queen's warehouse without, as far as appears, giving any instructions to the person having charge of the warehouse as to the disposal of the goods, and so place it in the power of the first person who satisfies the warehouse-keeper that the dues have been paid to remove the goods without producing the only evidence of title, viz., the bill of lading duly endorsed by the shippers. Under the general law, the master or shipowner is bound to keep the goods on board, or in a warehouse at his own risk, for a reasonable time, to enable the consignee to fetch them (*Bourne vs. Gatcliffe*, 7, M. & G., 850). In the case of a transferable bill of lading like the present, if it be not produced, the master, after waiting a reasonable time, may deliver the goods to a third person to keep till it is produced (*Smith's Mercantile Law*, 8th ed., p. 307). In the present case the bill of lading expressly provides that "the cargo, if not taken out on the day of arrival, may be landed by the owner's agents at the expense and risk of the consignee," but this provision does not dispense with the necessity of a delivery to the holder of the bill of lading upon production of that instrument. It occurred to me however, at the trial, that the ship's agent might have intended the storing in the Queen's warehouse as a delivery, according to the custom of the port, to the persons entitled to the goods under the bill of lading, and that he would rely on this as a good

delivery on the ground that the holder of the bill of lading did not in terms of that instrument claim his goods on the day of the ship's arrival. But no evidence was offered of the custom of the port as to the manner of delivering up goods which could in any way affect the express terms of the bill of lading requiring a delivery to the order of the shippers. On the contrary, the defendants by their special plea virtually adopt the acts of the locker, and justify the delivery to Von Buettner on the ground that he was the lawful owner of the goods. It is clear that the ship's agent took no trouble by means of a public notice or otherwise to discover the holder of the bill of lading, or to inform him of the arrival of the goods, but left it to the discretion of the locker to deliver the goods to the person whom he should consider entitled to them. The effects of such negligence on the part of the defendants will be hereafter considered. As to the plaintiff's want of due diligence it is sufficient to observe that it has not been pleaded by the defendants or relied upon in argument, nor has any evidence been tendered to show to what extent the defendant has been prejudiced by such want of diligence. In the absence of such a plea and of such evidence this part of the case must be dismissed from the consideration of the Court. The main question at issue between the parties is, whether at the time the goods were delivered to Von Buettner & Co. the property, or at all events the right of possession, was vested in the plaintiff or in Von Buettner & Co. It may be laid down as a general rule that where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading as the one for whom they are to be carried. (*Shepherd vs. Harrison*, L. R. 5, House of Lords, 127.) If in the present case the bill had been made out for delivery to Von Buettner no difficulty could have arisen, for the agent would then have delivered the goods to the person indicated by the bill of lading as the one for whom they were to have been carried. But the shippers, when they delivered the goods to the captain, took from him a bill of lading to their own order, and thereby made the captain accountable to deliver them to the holder of the bill of lading. To quote the words of Lord Westbury (in the last-cited case), "the bill of lading was the symbol of property, and by taking the bill of lading they kept to themselves the right of dealing with the property shipped on board the vessel. They also kept to themselves the right of demanding possession from the captain. They had therefore all the incidents of property vested in themselves." But by

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endorsing the bill of lading in favour of the plaintiff, the shippers indicated him as the one for whom the goods were to be carried; as the one, therefore, who should have the right of dealing with the property and demanding possession from the captain. It was argued that as the invoice sent to Von Buettner mentions the goods as shipped by his order, and for his account and risk, the shippers intended to transfer the property immediately to him; but it has frequently been decided that words of this nature occurring in invoices or private instructions are not sufficient to control the rights reserved by the shipper under a bill of lading like the present. No Roman-Dutch law authorities have been quoted in this case, nor indeed are they likely to be of much assistance to the Court in a question affecting the merchant law of the present day. The enormous development of commerce in recent times requires a corresponding development of the mercantile law, so that it becomes impossible rigidly to apply the rules which obtained in Holland in the beginning of the present century to questions which arise out of customs of later growth. It is satisfactory, however, to find that the views which I have already expressed are not in any way inconsistent with any general principle of the Roman-Dutch Law. That law clearly recognises the validity of a constructive delivery to pass the property in goods as opposed to an actual delivery. It is laid down, for instance, that the owner of goods may make a good delivery to another person by handing over to him the keys of the warehouse in which the goods are stored (*Grotius*, 2, 5, 12). The key is the symbol of the property in the goods placed in the warehouse, in the same way as the bill of lading is the symbol of the property in the goods shipped on board. In the famous case of *Lickbarrow vs. Mason* (1, *Smith's L. C.*, 705) I find a reference made to the practice of merchants in Holland as to bills of lading in the latter end of the last century which strongly confirms this view. Lord Loughborough, in delivering the judgment of the Exchequer Chamber, says:—"In an action tried before me at Guildhall, after the last Trinity term, it appeared in evidence that one Bowering had bought a cask of indigo of Verrulez, at Amsterdam, which was sent from the warehouse of the seller, and shipped on board a vessel commanded by one Tulloh, by the appointment of Bowering. The bills of lading were made out, and signed by Tulloh, to deliver to Bowering or order, who immediately endorsed one of them to his correspondent in London, and sent it by the post. Verrulez, having information of Bowering's insolvency before the ship sailed from the Texel, summoned Tulloh, the shipmaster, before the Court at Amsterdam, who ordered him to sign other bills of lading, to the order of Verrulez. Upon

the arrival of the ship in London the shipmaster delivered the goods, according to the last bills, to the order of Verulez. This case, as the practice of merchants, deserves particular attention, for the judges of the Court at Amsterdam are merchants, of the most extensive dealings, and they are assisted by very eminent lawyers." Lord Loughborough's object in making this reference appears to have been to show that the Court at Amsterdam had the power, upon the insolvency of the consignee, to stop the goods *in transitu*, by ordering the captain to sign fresh bills of lading to the shipper's order, and also to support his opinion (which was not, however, afterwards upheld by the House of Lords) that the unpaid vendor could exercise his right of stoppage *in transitu*, even as against a *bonâ fide* assignee for value of the bills of lading. But for my present purpose the case is useful to show that the Court of Amsterdam considered the bill of lading as the symbol of the property, to this extent even that the endorsement by the shipper of a bill of lading to his order could divert the rights of an insolvent consignee under a prior bill of lading made to the order of such consignee. A doubt suggested itself to me after the argument as to whether the plaintiff can maintain the action without declaring and proving that he gave value for the bill of lading. Upon further consideration, however, it appeared to me that, under the general principles already laid down, the plaintiff had such a special property in the goods as to entitle him to bring this action, and that the object of the law recognising to a certain extent the negotiability of bills of lading would be defeated if an inquiry were in each case to be instituted as to whether the plaintiff gave value for the bill of lading or not. I am strengthened in this view by the case of *Morrison vs. Gray* (2, Bing., 260), where the question arose whether a person to whom a bill of lading had been endorsed, but who omitted to prove that he had given any value for it, could recover in an action of trover against the wharfinger in whose custody the goods were. Chief Justice Best observed: "The doctrine touching bills of lading is of exceeding convenience to commerce. The owner cannot always follow his goods to a distance; he can only protect himself, in many instances, by transferring the bill of lading;" and he and the other judges of the Common Pleas concurred in the view that the action was maintainable. The result is that, in my opinion, judgment should be given for the plaintiff for the sum of £53 5s. 5d., being the value of the goods wrongfully delivered by the defendants to Von Buettner, with costs.

Judgment accordingly for plaintiff, with costs.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.]
[Defendants' Attorneys, REID & NEPHEW.]

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PART II.

VAN DER WESTHUYZEN vs. RAUBENHEIMER.

Pound Ordinance, No. 16, 1847, sections 49, 55.—Criminal Prosecution.—Civil action.

A criminal prosecution under the Pound Ordinance, on the complaint, and in the name and on behalf of the injured person, does not bar such person from instituting a civil action for damages for the injury.

This was an appeal from the Court of the Resident Magistrate of George. In the Court below Van der Westhuyzen sued Raubenheimer in an action to recover £20 damages, on a plaint setting forth that the defendant, through his servants, on or about the 9th January, 1875, drove a flock of goats, in number about 500, the property of the plaintiff, from a piece of Government land in the occupation of the plaintiff, to the residence of the defendant; and that after driving the said flock of goats a distance of one hour's ride, the defendant caused them to be driven into a kraal where he detained them for about three hours; and that thereafter, on the 14th January, 1875, the defendant and his servants again removed the said flock from the said Government land and drove them a distance of about six miles, and that in consequence of the illegal and malicious acts so committed the plaintiff had sustained damages.

Previous to the institution of this action Van der Westhuyzen had, in his own name and on his own behalf, complained of and prosecuted Raubenheimer and three other persons, his servants, in the Court of the Resident Magistrate, for having on the 9th January, 1875, contravened the 49th section of Ordinance No. 16, of 1847, by wrongfully and unlawfully molesting, driving, and scattering the same flock

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of goats, then running on the said Government land. After hearing the evidence the Magistrate found the prisoners "not guilty," and discharged them.

The defendant's agent, before pleading, now excepted to the proceedings, on the ground that as the criminal action had been instituted privately, it was a bar to a civil action relating to the same case.

The Magistrate sustained the exception, and dismissed the summons with costs. Against this decision the plaintiff now appealed.

Jacobs, A.G., for the appellant, submitted that the wrongs sued for in the civil action differed from those alleged in the criminal prosecution, and even if they did not, there was nothing in law to bar the plaintiff from recovering in an action of damages.

Cole, for the respondent, cited *Russouw vs. Sturt*, 1, *Menz.*, 378, to show that though a prosecution at the public instance did not bar the injured party, yet that the injured party could not both prosecute criminally and sue civilly for the same injury, but must make his election. This distinction was the more applicable to this case, as by the 55th section of the Ordinance, all fines and penalties when recovered were to be paid to the person proceeding for the same.

The Court overruled the exception. With regard to the argument based on the 55th section of the Ordinance, had the party suing received a fine imposed in the criminal prosecution, the Magistrate could have taken this into consideration when assessing damages in the civil action.

Appeal accordingly allowed, with costs.

[Appellant's Attorney, C. C. DE VILLIERS.]
[Respondent's Attorney, TIRAN.]

JONES vs. BORRADAILE, THOMPSON, HALL & Co.

Pleading.—General Issue.—Tender.

A plea of tender cannot be pleaded together with the general issue to the same cause of action.

It is no ground of exception to a replication that it contains averments proveable under the general denial.

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daile, Thomp-
son, Hall
& Co.

This was an action of debt to recover the sum of £349 2s. 2d., being the price of certain shooks or cask staves, with their fittings, amounting to 22,822 gallons, American measurement, purchased by the defendants at the rate of 3½d.

per gallon, and for four casks measuring, 1,117 gallons, American measurement, also purchased at the same price at a public auction on the 4th September, 1874.

The defendant pleaded, first, the general issue in the usual form; and then, specially, that the shooks and casks were put up for sale by the gallon, and that it was not made known to defendants and others attending the sale that the gallon was not the gallon measure in use in this Colony; and the defendants bid for and bought the shooks and casks under the *bonâ fide* belief that the same were being sold according to the usual gallon measure and not according to American measurement; and that had they known the sale was according to American measurement, they would not have bought the goods at the price mentioned, and therefore they were not bound to complete the purchase, and that immediately upon discovering they were sought to be charged according to American measurement they repudiated the sale; and that the shooks and casks bought according to the measurement in force in this Colony only amounted to 13,112 gallons, which at 3½d. per gallon amounted to £191 4s. 4d., which sum the defendants had always been and still were ready and willing to pay, and since the commencement of the suit had tendered and offered to pay, with costs of suit. The defendants pleaded further a tender of the said sum of £191 4s. 4d. There was also a claim in reconvention.

The plaintiff, after the similitur and general issue to second plea, replied that before and at the time of the sale it was distinctly declared in the presence and hearing of defendant's agent, that the goods would be sold according to American measurement. And as to the pleas of tender, the plaintiff excepted to the same as bad in law, inasmuch as the defendants having pleaded the general issue to the whole claim of the plaintiff, it was not competent for them afterwards to plead a tender; wherefore he prayed that the pleas be expunged.

Cole (with him Kotzé), for the plaintiffs, appeared to support the above exception, and contended that it was not competent to the defendants to plead double, that is, first a plea of *non assumpsit* or *non est factum* to the whole declaration; and secondly, a plea of tender as to part. Counsel cited *Saunders on Pleading*, 2nd ed., vol. 2, p. 1,042. *Chitty* and *Bullen and Leake* laid down the same doctrine.

Jacobs, A.G. (with him Jones), for the defendants, contended that the plaintiff had mistaken the nature of the pleadings. The action was brought to recover an amount due on a certain contract of sale. The defendants denied their liability on the contract as declared upon. They

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then set forth a certain other contract upon which they were liable to the extent named in the plea, and they made a tender of the amount so due on this contract.

The Court sustained the exception with costs, but gave defendants the option either to amend the general issue, or to strike out the plea of tender.

The defendants elected to amend the general issue, by inserting the words "save and except as in the special plea mentioned."

To the plaintiff's special replication, the defendants excepted that it afforded no answer to defendants' second plea, and that it was a departure from the plaintiff's declaration, and therefore prayed that it should be expunged.

Jacobs, A.G., in support of this exception, urged that it was no answer to the plea that a casual declaration had been made at the sale that the goods were sold by American measurement. It was not asserted there was any condition of sale to that effect. The replication modified the contract as stated in the declaration.

Cole, for the plaintiff, replied.

The Court overruled the exception with costs. The plaintiff might have relied on a general denial at the trial and proved the facts stated in the replication; but there was no departure from the rules of pleading in placing these facts on the record.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.]
[Defendant's Attorney, TREGOLD.]

McDONALD, TUTOR DATIVE OF PATERSON, vs. BRAMSON.

Bill of Costs: proof of amount of.

Pleading.—General issue, followed by plea of tender; effect of.

A writ of execution issued upon a sentence for costs is admissible in evidence, and is, without the production of the Master's allocatur, prima facie proof of the amount due upon the Bill of Costs.

A tender, pleaded with and following the general issue, does not relieve the defendant from liability for costs upon judgment being recovered against him only for the amount tendered.

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" 25.

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The defendant was sued in the Circuit Court for Port Elizabeth for the sums of £90, being six months' rent, and £30 5s. 5d., being municipal rates and taxes, due in respect

of certain premises leased by him from the plaintiff in his capacity as Tutor Dative of the minors Paterson. The defendant pleaded the general issue; and then specially in respect of the claim for £90, a set-off of £86 7s. 3d., being an amount due by plaintiff to defendant upon a Judge's order for law costs recovered by him against the plaintiff on the 15th May, 1874; and a tender of £3 12s. 9d., the balance of the said sum of £90; and as to the claim for rates and taxes the defendant pleaded a tender of £22 2s. 3d.

The plaintiff, after joining issue, replied that the Judge's order in the special plea mentioned was obtained by means of the false and misleading statements contained in a certain affidavit sworn to by the defendant, on the 4th December, 1873.

Defendant rejoined generally.

In the Court below, upon the case being called on, defendant's Counsel admitted the debt, but claimed a set-off for costs. The *onus probandi* being thrown on defendant, he tendered a writ as evidence of a bill of costs, which writ the presiding Judge refused to receive, Counsel having stated that he had not the Master's allocatur in Court. Judgment was thereupon entered for the plaintiff with costs; defendant to be at liberty to bring an action for the costs mentioned in his plea of set-off.

From this judgment the defendant appealed. The writ of execution and the order of the Eastern Districts' Court, though not mentioned in the Judge's notes as having been put in, were included in the record sent up to the Supreme Court. The writ was in due form, and had been issued by the Registrar of the Eastern Districts' Court on the 4th June, 1874, against the respondent McDonald, in his capacity as Tutor Dative of the minors Paterson, and purported to be for "the sum of £45 13s. 1d. which Bramson by sentence of the Court of the Eastern Districts, bearing date the 15th May, 1874, recovered against the said McDonald as aforesaid, together with the sum of £40 13s. 4d. for the costs and charges of the said Bramson by him about his suit in that behalf expended, whereof the said McDonald was convicted, as appears to us of record."

Ross-Johnson (with him *Upington*), for the appellant, argued that the writ was admissible as evidence without the Master's allocatur, more especially as the Registrar of the Court who issued the writ was also the taxing officer. The writ was issued in a matter between the same persons who were parties to the action, and was sufficient without even a copy of the judgment. (*Taylor on Evidence*, sec. 1,570.)

Cole (with him *Buchanan*), for the respondent, contended that the production of the writ was not sufficient, nor was it the best evidence that could be had. The set-off was

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not a plea of a judgment obtained and writ issued thereon, but was a plea of a debt due upon a Judge's order, and the order should have been put in evidence. The order might differ from the writ, as for example there might be other parties to it; and had it been put in evidence the plaintiff might under his replication have shown it was wrongly obtained.

Upington replied.

Cur. adv. vult.

Postea (May 25),

DE VILLIERS, C.J., in delivering the judgment of the Court, said:—I am clearly of opinion that the writ was *prima facie* evidence of the amount due by the respondent to the appellant, and that it ought to have been received as such by the Court below. It cannot for a moment be assumed, without proof, that the Registrar of the Eastern Districts' Court would be so grossly negligent in the performance of his duties as to issue a writ purporting to be witnessed by the Senior Judge of the Court, without satisfying himself that the costs mentioned in the writ had been duly taxed by the Master. On the contrary, the law will assume that the Registrar did his duty on the principle of the maxim *omnia praesumuntur rite esse acta*. The presumption becomes still stronger when it is borne in mind that the Registrar performs also the functions of the Master of the Court, and that it is expressly provided by the 36th Rule of Court that no process of execution shall issue for the levying and raising of any costs awarded by the Court to any party until the same have been taxed by the Master of the Court. In fact the Counsel for the respondent, in his argument on appeal, scarcely relied on the absence of the allocatur, but he endeavoured to support the judgment on entirely different grounds. He maintained that the order of the Eastern Districts' Court ought to have been produced in the Circuit Court, and that if it had been so produced the respondent would have been in a position firstly, to show that the writ varied from the order, and secondly, to prove that the order had been obtained from Mr. Smith by means of false and misleading statements. In regard to the first objection, it is sufficient to say that it was quite competent for the respondent himself to produce the order, and that in the absence of the order the Court will presume that the writ does not vary from the order. But the Counsel for the respondent does not deny that the Judge's order, which forms part of the record, is a true copy of the original order, and certainly that copy by no means

bears out the assertion of a variance, or that the respondent was not a party to the suit in which the order was made. As to the second objection, that the respondent was deprived of the opportunity of proving that the order had been obtained by means of false statements, it does appear to me extraordinary that such an objection should be started by way of replication to the defendant's pleas in the Circuit Court, instead of being used as a ground for setting aside the order in the Court in which it was made. Surely the proper tribunal for setting aside an order obtained by fraud or falsehood is the Court in which it was made or the Supreme Court,—for if it were otherwise it would be competent for any Circuit Court to set aside by indirect means, or at all events wholly to ignore, a judgment of the Eastern Districts' Court, or even of the Supreme Court. Nor can it be urged that sufficient time had not elapsed to enable the respondent to move the Eastern Districts' Court or the Supreme Court to set aside the order, for the order was made on the 15th May, 1874, and served on the respondent on the 22nd of the same month, whilst the objection now under consideration was not taken until November, and then only by way of replication to the plea. Such being my view, it is unnecessary to comment upon the vagueness of the replication which alleges that the order was obtained by false and misleading statements, without even setting forth those statements, or averring in what respect they were false and misleading. The conclusion at which I have arrived is, that the plea of set-off ought to have been allowed, and that the judgment of the Circuit Court ought to have been for the amount tendered instead of the full amount of rent claimed, leaving it to the respondent to take such other steps as he might be advised for annulling the order of the Eastern Districts' Court. On the question of costs, however, I am of opinion that the Court below was right in ordering the appellant to pay them. The plea of tender, coming as it does after the general issue, cannot be treated as an absolute tender so as to relieve the appellant from the payment of costs upon a judgment in which a balance was found against him. The judgment of the Circuit Court must therefore be altered so as to stand thus: "Judgment for the plaintiff for the sum of £25 15s. with costs." The appellant, having succeeded in obtaining a substantial alteration of the judgment in his favour, is entitled to his costs of this appeal.

Judgment accordingly for plaintiff for £25 15s. and costs.
Appellant to have his costs of appeal.

[Appellant's Attorneys, FAIRBRIDGE & ARDERNE.]
[Respondent's Attorneys, REID & NEPHEW.]

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*In re STENEKAMP.**Insolvency.—Judgment Creditor.*

The voluntary surrender of an estate refused, it appearing that a mortgage creditor would be delayed in obtaining satisfaction of his judgment, and that no benefit to creditors would result from surrender.

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—
In re Stene-
kamp.

Jacobs, A.G., on behalf of Schalk Willem Stenekamp, applied for the acceptance of the surrender of his estate. The schedules showed debts to the extent of £443, and assets only £322, leaving a deficiency of £121. Applicant's affidavit stated that he was a resident at Kimberley, but that his principal creditors and all his property were within this Colony.

Buchanan, for Gous, a judgment creditor, opposed the adjudication of sequestration, on the ground that the surrender would not be for the interest of the creditors, and that it was now tendered to delay execution. Affidavits stated that the opposing creditor had obtained judgment on a mortgage bond for £151 13s., and interest, less £48 received on account, and the property hypothecated had been declared executable. A meeting of mortgages had been called and the sale was shortly to take place; great expense had been incurred in edictal suits, and if the surrender was accepted the expense attending a sale under sequestration, trustee's commission, &c., would amount to considerably more than the expense necessary to complete the sale under the judgment of the Court.

The Court saw no reason for interfering with the rights of the judgment creditor inasmuch as the creditors would derive no benefit from the surrender of the applicant's estate; and refused the application for the surrender, with costs.

[Applicant's Attorney, VAN ZYL.]
[Creditor's Attorney, BUISSINNE.]

*HEYNS vs. SPOLANDER.**Reconvention.*

The plaintiff cannot set-off against a claim in reconvention a further sum due to him by the defendant. Such sum should have been claimed in the summons.

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—
Heyns vs. Spo-
lander.

The plaintiff sued defendant in the Court of the Resident Magistrate for Cape Town to recover the sum of £1 10s.

due for cart hire. Defendant admitted the debt, and filed a counter-claim for £2 6s. 8d. for beef sold and cash lent. The plaintiff denied the counter-claim, but acknowledged he owed defendant the £2 6s. 8d., against which plaintiff alleged he had a claim upon defendant for £3 4s., the price of two pigs sold to him. After hearing the evidence on this point, the Magistrate gave judgment for plaintiff with costs, and disallowed defendant's counter-claim. From this the defendant now appealed.

Buchanan, for the appellant, claimed judgment for the defendant for the difference between the counter-claim and the amount sued for, both of these accounts having been admitted at the trial.

Respondent did not appear.

DE VILLIERS, C. J. :—It is clear the Magistrate has made a mistake. The plaintiff claimed only £1 10s. and admitted he owed defendant £2 6s. 8d., but against this he wished to set up another claim. If there was anything more than the £1 10s. due to the plaintiff, he ought to have claimed it in his summons.

Appeal allowed accordingly with costs, and judgment entered for defendant for 16s. 8d.

[Appellant's Attorney, MOORE.]

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June 3.
—
Heyns vs. Spo-
lander.

PATERSON vs. PEARSON AND OTHERS.

Pleading.—Misjoinder of Counts.—Incorporated Company.

Where the plaintiff sued to have a proof of debt which had been made by a Bank in his insolvent estate amended, and in the same action claimed to have restored proofs of debt made on behalf of his minor children, and on behalf of trustees under a marriage settlement, an exception of misjoinder of counts allowed.

A duly incorporated English company is entitled to be sued in its corporate name.

Henry William Pearson, in his capacity as trustee in the insolvent estate of John Paterson, and Robert Stewart, formerly one of the trustees of the said estate, and in his said capacity and also in his capacity as general manager in this Colony of the Standard Bank of British South Africa (Limited), were summoned to answer John Paterson in an action to amend certain proofs of debt, and for other purposes.

The declaration set forth that plaintiff was formerly a partner in the firm of Paterson, Kemp & Co., carrying on business as merchants in Port Elizabeth; that the estate of

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" 8.
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the said firm was sequestrated as insolvent, in consequence whereof the private separate estate of the plaintiff was thereafter, in April, 1876, also sequestrated; and that the defendants, Pearson and Stewart, were appointed the trustees of such private and separate estate, but thereafter and subsequent to the grievances complained of, the said Stewart, at his own request and through his instrumentality, was removed from his office as joint trustee. That among the proofs of debt tendered and made against plaintiff's said estate were the three following: Robert White, for £1,000, as security for which he admitted he held certain fifty shares in the said Standard Bank; Messrs. Flux and Argles, for £1,000, for which they also admitted they held as security fifty shares in the said Bank, and offered to take the same over at £15 per share, but which offer was not accepted by the trustees; and John Whitehead, for £2,000, for which he also admitted he held as security one hundred shares in the said Bank, and also offered to take the same over at £15 per share, but which was also not accepted by the trustees. That the said three proofs were made by the defendant Stewart as the duly authorised agent in that behalf of the said three creditors. That the said three claims remained and continued as proofs against the estate, and the shares therein mentioned remained and continued the property of the estate, up to the filing of the 4th Liquidation Account, when a new entry of proofs was made, setting forth securities realised, but not saying what number, at what rate realised, or at what rate per share, which condition of affairs continued until the framing of the 5th Liquidation Account, when the whole of the said securities were made to disappear, and the Standard Bank appeared as a substituted creditor in lieu of the aforesaid three creditors. That by the 4th Liquidation Account the claim of R. White had been reduced by the supposed realisation of the said shares to £398 18s.; the claim of Flux and Argles to £495 9s. 5d.; and the claim of J. Whitehead to £797 16s.; but that such reduction was entirely insufficient and altogether fallacious, inasmuch as the true value of the several shares at the time when the deduction was made was more than £25 each, irrespective of dividends which had been from time to time received on the said shares, so that instead of the said three creditors having any claim against plaintiff's estate, they had in truth and in fact become indebted to the estate. That the plaintiff had applied to the defendants in their capacity as trustees, and to defendant Stewart in his capacity as General Manager of the Standard Bank, the cessionary of the said three claims, to have the proofs amended, and the estate credited with the original amount of the claims and the real value of the

securities held against them, but the defendants refused to make any such amendment. Wherefore the plaintiff prayed that the defendants should be condemned to make such amendment, and to give such credit to the estate as the facts warranted, and to render a true and proper inventory of the estate in strict accordance with the 108th section of the Insolvent Ordinance; and that the defendant Stewart, in his capacity as cessionary of the claims, be ordered to pay into the estate the sums which upon such amended account should be found due in respect of the said claims and the securities held against them.

The declaration then proceeded to set forth, that amongst other claims proved against plaintiff's estate was one on behalf of his minor children for £1,544 9s. 8d., the balance of moneys bequeathed to them by their maternal grandfather, but short invested at the date of insolvency; which claim the trustees, without any lawful authority, took upon themselves to strike out and expunge. Wherefore the plaintiff prayed that defendant Pearson, in his capacity as trustee, should be condemned to restore the said proof, and rank the plaintiff's children as creditors against the estate. And further, that amongst other proofs against the estate was one made by the trustees of the marriage settlement of Mrs. Paterson, but the form and amount of such proof had, without lawful authority, been altered by the trustees, therefore the plaintiff prayed that it should be restored to its original form and amount.

Before pleading to the declaration, defendant Stewart filed the following exceptions: 1st. That there was a misjoinder of counts, inasmuch as although as to part of the first count a cause of action might be shown against him, no cause of action was shown against him in the second and third counts. 2nd. That the declaration was vague, inconsistent, and bad in law. And should the above be overruled, he further excepted to the first count on the following grounds:— 1st. That if any cause of action was disclosed therein, it was not against him, but against the Standard Bank, which is a body corporate under "The Companies' Act (1862)," and should have been sued as such. 2nd. That as to so much of the said count as prayed that the said defendant might be condemned to file and render an inventory as therein mentioned, no ground for such prayer was shown. 3rd. That as to so much of the said count as prayed that the said defendant might be condemned to give certain credit to the said estate as therein mentioned, and to pay into the said estate certain sums of money as therein mentioned, no ground for either of said prayers was shown. 4th. That the said count sought to charge defendant to do several different things in

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several different capacities. 5th. That the said Stewart was improperly joined as a co-defendant. 6th. That the said count was in other respects vague, uncertain, inconsistent, and bad in law. And to the third count in the declaration he excepted on the following grounds:—1st. That no cause of action against the said defendant was shown therein. 2nd. That if any cause of action was shown, the proper parties were not before the Court either as plaintiffs or defendants. 3rd. That the said Stewart was improperly joined as a co-defendant. 4th. That this action was brought pursuant to an Order of Court, and that the said third count ought not to have formed part of the declaration. 5th. That the said count was vague, uncertain, and in other respects bad and insufficient in law.

The defendant Pearson, in his capacity as trustee, excepted to the declaration on the following grounds:—1st. That the several counts of the declaration were vague, uncertain and bad in law. 2nd. That the said several counts did not disclose sufficient right or grounds of action by the plaintiff against him. 3rd. That if any cause of action was shown the proper parties were not before the Court as plaintiffs or defendants. 4th. That this action had been instituted pursuant to an Order of Court, and that the third count had been improperly joined and formed part of this action.

Both defendants pleaded over. The Order of Court referred to, directed the plaintiff to bring his action to substantiate certain objections lodged by him against the 5th and 6th Liquidation Accounts. None of these objections were directed against the alteration of the proof of debt made by the trustees of the marriage settlement of Mrs. Paterson.

Jacobs, A.G. (with him *Maasdorp*), argued in support of the exceptions taken by defendant Stewart, that there was a misjoinder of the capacities of the defendant and of the causes of action. The Standard Bank were only cessionaries of certain claims, and the action to refund should be against the original claimants, not against the Bank. The Bank was a body corporate, and must be sued as such. (*Lindley on Partnership, 2nd ed., p. 494.*) The plaintiff had no right to sue in his own name for a claim due his minor children, nor for the trustees of Mrs. Paterson's settlement.

Buchanan, for defendant Pearson, objected to the misjoinder of the parties. If the action was to recover from the Bank, the trustee should have been joined as plaintiff, not made a defendant. As to the second and third claims, the proper parties were not before the Court.

Cole (with him *Upington*), for the plaintiff, withdrew the last count of the declaration. As to misjoinder of defendants, the plaintiff had a perfect right to bring Stewart into Court as a former trustee of the estate. Stewart was

properly sued as the General Manager in this Colony of the Bank, which was not an institution incorporated here. The plaintiff was natural guardian of his minor children, and therefore entitled to sue on their behalf.

Jacobs, A.G., replied. Plaintiff did not sue as natural guardian, but in his individual capacity. The Bank, though incorporated in England, should be recognised as a Corporation here (*Taylor on Partnership*, 2nd ed., p. 1,425).

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others.

Cur. adv. vult.

Postea (June 8),

DE VILLIERS, C.J., said:—I have carefully read over the case and find it is impossible to allow the pleadings to stand. The first count prays the amendment of the Liquidation Account and asks for an inventory. This right is claimed on behalf of Mr. Paterson himself. The second count is on behalf of his minor children, and the third for the trustees of the marriage settlement. The third count is withdrawn, but the fact of its withdrawal is an admission of misjoinder. Mr. Paterson objected to the confirmation of the Account as framed, and the Court found it impossible to decide his objections on motion, and directed pleadings to be filed. All that was meant by this was that an action must be brought in the ordinary way. If the plaintiff wished to try the objections made on his own behalf, and those on behalf of his minor children, he must bring two actions. The exception of misjoinder of counts must be allowed. That being so it is not necessary now to discuss the other exceptions. I would, however, point out to the plaintiff's Counsel that should the case proceed to trial, and it be shown that the Standard Bank was a corporation entitled to be sued in the corporate name, the plaintiff could not succeed in this action against the Bank.

DENYSSEN, J., and FITZPATRICK, J., concurred.

Exception of misjoinder allowed accordingly. Costs to be costs in the cause.

[The plaintiff subsequently withdrew the declaration, and fresh pleadings were then filed.]

[Plaintiff's Attorneys, REID & NEPHEW.
Defendant's Attorneys, FAIRBRIDGE & ARDERNE.]

ZEYSTER vs. GHISLIN.

Pleading.—General issue.—Tender.

The plaintiff having excepted to a plea of tender pleaded after the general issue, cannot compel the defendant to

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abide by the tender, but the defendant may elect to withdraw his plea on judgment being given against him on the exception.

Plaintiff sued defendant in an action for £300 damages, sustained by reason of the wrongful acts of the defendant in having procured and enforced a writ of ejectment against the plaintiff. The defendant pleaded first, the general issue in the ordinary form; and then specially, a tender after summons of £10 and costs, in satisfaction of the damages alleged to have been sustained. The plaintiff joined issue on the first plea, and excepted to the special plea as bad and insufficient.

After pleadings had been closed, the case of *Jones vs. Borradaile, Thompson, Hall & Co.* (*ante*, p. 38). was decided; and the defendant's attorney gave notice to the other side that in consequence of that decision he would withdraw the special plea and rely on the general issue. The plea was not, however, taken off the file, and the case was set down for hearing.

Buchanan, for the defendant, submitted to judgment on the exception, and proposed to withdraw the plea.

Cole, for the plaintiff, objected, and maintained that the defendant must be held liable in any event to the extent of his tender.

The Court gave judgment sustaining the exception with costs, but allowed defendant to elect either to withdraw the plea or amend the general issue so as to admit of the tender being pleaded.

The defendant elected to withdraw the special plea, and the case proceeded on the merits, when the plaintiff having failed to establish his title to the property in question, the Court granted absolution from the instance with costs.

[Plaintiff's Attorney, OLTHOFF.
Defendant's Attorney, BLORE.]

DE VILLIERS vs. THE CAPE DIVISIONAL COUNCIL.

Quit-rent tenure.—Emphyteusis.—Converted Loan Places.—Proclamation of 6th August, 1813.—Main and Divisional Roads.—Act 9, 1858, s. 11.—Act No. 10, 1864, s. 3.

Lands held on quit-rent tenure, not being converted loan places, are not, in the absence of any special reservation in the original grant, subject to the right reserved to Government by the provisions of Sir John Cradock's Proclamation of 6th August, 1813, of raising materials thereon for the purpose of making or repairing public roads. [DE VILLIERS, C.J., diss.]

This was an action for trespass. The declaration stated that Cornelis Valkenburg de Villiers, the plaintiff, was the proprietor and occupier of certain pieces of quit-rent land situated in the Cape Division, originally granted to J. A. Dell on the 15th September, 1814, and 31st May, 1815, respectively, and transferred to plaintiff on the 17th February, 1866. That on or about the 1st day of March last, and on divers days and times afterwards, the defendants, by their servants and agents, and with vehicles, horses, oxen, and other animals, entered upon the said pieces of land, and dug up and removed therefrom certain gravel, stones, and earth, and trampled upon and destroyed the pasturage of the said land, whereby the plaintiff was damaged to the amount of £25, for which amount he prayed judgment; and also that defendants might be restrained by perpetual interdict from again entering on the said land without plaintiff's license and consent, and from removing therefrom any gravel, stones, or other matter or things; or otherwise, should it be found that the defendants had any right to remove gravel, &c., from the said land, that it be declared that such right could not be exercised with respect to cultivated, arable, or sowing land, without compensation to the plaintiff.

The defendants pleaded first, the general issue. Secondly, that they were by law entitled to dig, get, and carry away from the plaintiff's said quit-rent place, any stone, clay, or other material which might be required or serviceable for making or repairing any main road, and that their so digging, getting, and carrying away ground from the plaintiff's said place for the purpose of repairing the main road, called the Wellington Road, was the alleged trespass in the declaration complained of; and that they dug, took, and carried away, ground from a place specially pointed out to them by the plaintiff as a fit and convenient place for that purpose.

The replication was general.

At the trial (August 18), it appeared that the land on which the alleged trespass was committed was transferred to the plaintiff on the 17th February, 1866, by Hendrik Cornelis van Niekerk, who had derived his title thereto from the original grantee, Jan Albertus Dell, who had been granted the land on perpetual quit-rent by the Crown on the 31st May, 1815. This original deed of grant, after stipulating for the payment of an annual quit-rent, the proper cultivation of the land, and other matters not material to the issue, contained the following provisions: "The land thus granted being further subject to all such duties and regulations as there are already or shall in future be established respecting and granted under similar tenure." Evidence was

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1875.
Feb. 5.
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led as to the trespass and removal of the gravel, but it was disputed whether or not the plaintiff had indicated the localities from which the materials for the repair of the road were to be taken. The pits from which the gravel had been taken were old pits, but had been disused for some time.

Jacobs, A.G. (with him *Kotzé*), for the plaintiff, contended that defendant's plea of justification had entirely failed. The Government in the original grant had reserved no such right as was claimed by the defendants. It was true Sir John Cradock's Proclamation of the 6th August, 1813, gave Government certain rights, but these extended only over such quit-rent lands as were converted loan places, and did not apply to lands originally granted on quit-rent. The Public Roads Act, No. 9, 1859, transferred the control of main roads to certain Commissioners, and the 10th section of that Act vested these Commissioners with power of taking possession of land belonging to Her Majesty for the purpose of such roads, and gave them power to dig and carry away material from such land for making or repairing any main roads; but no power was given to take materials from private lands without compensation. By the Act No. 10, 1864, the several Divisional Councils in the Colony were placed exactly in the same position as the Road Commissioners had been, and had no greater power to enter on private lands than they had. The right claimed by defendants imposed a very onerous burden on quit-rent land, and such a servitude required to be strictly proved to exist before it could be judicially recognised. (*Domat*, 1, 12, 1, 9; *Erskine's Institutes*, 2, 9, 34; *Maclede's*, b. 1. c. 4, sec. 2).

Cole (with him *Buchanan*) for the defendants, submitted that the defendants, by the Acts of Parliament referred to, had been vested with all the rights possessed by Government with reference to the entering of lands for the purposes of main roads. The operation of the Proclamation of 1813 was not limited to converted loan places but was intended to establish a new tenure on this Colony, namely, that of quit-rent. The grant to plaintiff's predecessor expressly provided that the land was to be held on the same terms as lands granted on "similar tenure." This grant was made after the date of the Proclamation, and the words "similar tenure" could apply only to the tenure created by the Proclamation, for there was no other tenure in the Colony by which lands were held upon quit-rent.

Jacobs, A.G., replied.

Cur. adv. vult.

Postea (February 5, 1875)

The Court desiring information as to the conditions contained in the old deeds of grant of land in this Colony, Mr. Leopold Marquard, Examiner of Diagrams in the Surveyor General's Office, and Mr. Jacobus Petrus de Wet, Chief Clerk to the Surveyor General and Secretary to the Land Board, were examined as to the dates of the first grant, the conditions and stipulations applicable to the different tenures, and the changes which from time to time had been introduced by Proclamations and Government Notices in the nature of the titles to land issued by Government. The following memorandum relative to the land tenures of the Colony, prepared by Mr. Marquard, was put in:—

1. On 20th December, 1810 (Sir John Francis Cradock, Governor), the Deputy Colonial Secretary, Lieut.-Colonel C. Bird, wrote to Fiscal J. A. Truter, asking his opinion on sundry matters relating to the Land Tenure of this Colony, such as: The origin of Loan Places and their Rights; the Origin of Perpetual Loan Places (Leenings' Eigendom) and their Rights; the Commutation of Loan Places into Freehold, measured by Diagram; the Rights of measured Freeholds to Commonage.

2. Fiscal Truter replied on 28th June, 1811, and stated, *i.a.*:—In 1654, only little gardens were granted on loan, so far as appears, without rent. Lands for the grazing of cattle were also granted on loan, as far as I can find, without rent. The first taxes (recognition) on loan places were known in 1714. Property grounds were known since 1657, and still continue. A third tenure, grant on fifteen years' quit-rent, was introduced on 18th February, 1732. Thus there are three tenures—loan, property, quit-rent. Loan places and quit-rent grants are resumable by the Government.

3. On 6th December, 1811, Governor Cradock wrote to Colonial Secretary Henry Alexander, on the subject of land tenures, quoting the opinion of H.M. Privy Council of 22nd April, 1811, "that there should be no alienation during a temporary possession by conquest," and expressing his intention of recommending to H.M. Government in future to grant waste lands in perpetuity upon annual payment of a quit-rent.

4. On 23rd December, 1811, Deputy Colonial Secretary Bird wrote to Governor Cradock. He admits that the tenure of the loan land is wasteful and improvident, and as the evil is general, would apply a general remedy, so that there should not be diversity of tenure, which would create confusion. But he believes this course to be forbidden by the opinion expressed by H.M. Privy Council.

5. On 13th January, 1812, Deputy Colonial Secretary Bird asked the opinion of Fiscal Truter:—1. With respect

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to the nature and form of tenure, which would be most desirable in future grants or leases. 2. Respecting the practicability and expediency of making such alterations in the present tenure upon which loan places are held, as would give the holders a complete property therein upon terms of mutual advantage to Government and the parties.

6. Fiscal Truter reports his opinion on 11th February, 1812. With regard to the first point, he recommends that as loan places and fifteen years' quit-rent grants are subject to uncertainty, being resumable by the Government, the grants be henceforth on perpetual quit-rent. With regard to the second point, he recommends that loan places and fifteen years' quit-rent places should be converted into perpetual quit-rent wherever no particular reasons can be shown for the contrary. And he proposes certain rules for effecting this conversion, among which § 4 reserves to Government the right "of making and repairing public roads and raising materials for the same."

7. Governor Cradock, on 4th March, 1812, forwards the Fiscal's two reports and other documents relating to the land tenure to Earl Bathurst. The Governor desires in future to adopt quit-rent for new grants as well as in exchange for loan places, it being evident that perpetual quit-rent is intended by him, as he argues against expediency of exercising right of resumption by the Government.

8. Governor Cradock, on 16th October, 1812, publishes a Proclamation, in which he expresses his intention of granting government lands to applicants on quit-rent, in accordance with Interdiction of 18th February, 1732, it being deemed proper "that the most legal security should be given to property, and the inestimable advantage insured by its lawful transmission to the posterity of the present occupants."

9. Earl Bathurst, on 26th November, 1812, transmits to Governor Cradock a letter from Lords of Committee of Council of Trade, dated 30th September, 1812, and requests the Governor's conduct to be governed thereby. This letter of 30th September encloses a Minute of 23rd September, 1812, in which the Committee Lords state, with reference to Sir J. Cradock's Despatch of 4th March, 1812:—They agree in the opinion "that the holders of the land should have such a tenure in it as will be likely to induce them to apply capital and industry to its improvement, subject to a rent." They approve of conversion of loan tenure into perpetual quit-rent. With regard to future grants of waste land, they ask whether a lease for two or three lives would not be sufficient, it being as yet doubtful "whether the Colony will remain permanently in H.M.

possession." They think it would be a measure of very questionable policy to establish at the Cape of Good Hope an extended investment of British capital, which, if the Colony should hereafter be surrendered at the peace, would render it doubly valuable to the enemy, from its increased resources if the new settlers remained there, or involve their ruin if they abandoned it."

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10. Government Advertisement of 23rd July, 1813, establishes regulations for all persons applying for grants of land. Art. 1, runs thus:—"His Excellency declares his intention of only granting lands for ever, on a reservation of quit-rent."

11. Governor Cradock issued Proclamation on 6th August, 1813, in which the loan tenure is condemned as injurious to the interests of the country, and is called "an unworthy tenure, unfitted to the growing prosperity of the Colony, and only suited to the earliest and rudest institutions of the settlement." Further it is argued that certainty of tenures is required in order to give confidence that all improvements of the soil, &c., should indisputably belong to the holder, and should be exclusively secured to him, his heirs, executors, &c. These observations, taken in connection with previous Proclamation of 16th October, 1812, and Government Advertisement of 23rd July, 1813, would indicate an intention to provide by Proclamation of 6th August, 1813, for perpetual quit-rent grants in all cases, but the "terms and conditions" of perpetual quit-rent grants specified in the Proclamation are made to apply to loan leases converted into perpetual quit-rent grants. No. 4 of these terms and conditions reserves to the Government "the right of making and repairing public roads, and raising materials for that purpose on the premises."

12. Governor Cradock sends Despatch to Earl Bathurst on 23rd August, 1813, calls the loan tenure "a profane waste of land," states that every view he could take of the whole subject led him to the conclusion that a perpetual quit-rent was the tenure that did equal justice to the Crown and to the proprietor, and adds: "I cannot close without expressing how much the Colonial Government feels indebted to the Chief Justice Mr. Truter upon this great and arduous subject. From the commencement of its consideration to the conclusion I have received from him the most enlightened, judicious, and disinterested assistance. I have been emboldened to proceed to the execution of measures I could not well have trusted to my own judgment alone."

13. On 18th February, 1814, the Earl of Bathurst wrote to Sir J. Cradock's successor, Lord C. H. Somerset, that

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His Royal Highness The Prince Regent entirely approves of the general principle upon which Sir J. Cradock has proceeded (as communicated in his Despatch of 23rd August, 1813), and of the regulations which he has laid down upon the subject.

14. On 23rd August, 1815, Governor Somerset sends Despatch to Earl Bathurst, in which, with reference to the land tenures, he refers to the above Despatch of 18th February, 1814, as approving "of the suggestions of Sir J. Cradock," and adds: "Any individual who considers he can advantageously cultivate land, petitions me by memorial for the grant of the land." The Despatch then goes on to state how such applications are referred for inquiry to landdrost and heemraden, and sometimes to special commissioners, before being acceded to. A list of sixty-seven perpetual quit-rent grants made between 5th April and 31st December, 1814, accompanies the Despatch. Farm No. 12, on this list is the farm now belonging to Mr. Cornelis Valkenburg de Villiers, and with regard to which an action against the Divisional Council is now pending before the Supreme Court. It was granted on 15th September, 1814, to Johan Albrecht Dell. Extent—292 morgen, 48 square roods. Annual rent—Rds. 75.

15. In 1829, a Memorandum was issued from the Colonial Office for the guidance of the Land Board. This Memorandum commences thus:—"By the Government Advertisement of 23rd July, 1813, and Proclamation of 6th August, 1813, the intention of the Government on the subject of grants was declared, viz.: that none should thenceforth be granted unless on perpetual quit-rent. Colonial Office, 11th August, 1829." This shows the interpretation put by the Colonial Government of 1829 on the Proclamation of 6th August, 1813.

16. The first perpetual quit-rent grant made subsequent to Proclamation of 6th August, 1813, is dated 15th October, 1813. Before the issue of the Proclamation four perpetual quit-rent grants were made, viz.: three on 1st June, 1812, and one on 21st October, 1812. The form of these four grants is exactly the same as that of 15th October, 1813. No specific condition is inserted in the title deed as to the right of the Government to make or repair roads, or to raise materials for the same on the premises, but the following condition appears in it:—"The land thus granted being further subject to all such duties and regulations as either are already or shall in future be established respecting lands granted under similar tenure."

After again hearing Counsel,

Cur. adv. vult.

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The majority of the Court (DE VILLIERS, C.J., *diss.*), De Villiers vs. Cape Divisional Council. gave judgment as prayed with costs.

DE VILLIERS, C.J., after reciting the pleadings and facts above stated, said:—If it were clear that the land had originally been or formed part of a so-called “loan-place,” there would be no difficulty in deciding the question at issue between the parties, namely, the defendants’ right to take the gravel for road purposes. It is beyond dispute that, under the 4th clause of the Proclamation of Sir J. F. Cradock, bearing date the 6th August, 1813, the Government has the right of making and repairing public roads, and raising materials for that purpose upon lands, the tenure whereof has been converted from loan into quit-rent. By the 11th clause of Act No. 9, of 1858, the Commissioners of Roads were invested, for road purposes, with the legal rights belonging to the Government in respect to the taking of any land, and the raising and carrying away materials for making and repairing public roads, whether such rights had been reserved to the Government by the Proclamation above mentioned or had been created by express stipulation or condition in any grant of freehold property, or existed in any other way or manner whatsoever; and by the 3rd clause of Act No. 10, of 1864, every Divisional Council was invested, for main road purposes, with the rights, powers and authorities, previously conferred on the Commissioners of Roads, by the 11th clause of Act No. 9, of 1858. In the present case, however, it is urged, on behalf of the plaintiff, that the Proclamation applies only to lands, the tenure whereof has been converted from loan into quit-rent, and that the tenure of the land now in question could never have been so converted, inasmuch as the words “converted from a loan-place,” which are said to be usually endorsed on grants of converted quit-rent lands, do not appear on the face of the original grant of the 30th May, 1815. The defendants, on the other hand, contend that the 4th clause of the proclamation applies to lands originally granted on quit-rent as well as to converted lands, and that even if the clause does not so apply *proprio vigore*, the concluding provision of the grant, that the land shall be subject to all such regulations and conditions as are already established respecting lands granted under similar tenure, subjects the land to the burthens and confers on the grantee and his assigns the privileges created by the above clause. In order to a right solution of these questions, it will be

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convenient to begin by briefly adverting to the state of the law respecting the land tenures of the Colony at the time of the Proclamation. Until the year 1812 there existed three modes of tenure, viz., freehold, loan, and quit-rent for a limited term. The first grant in freehold was made on the 22nd June, 1657, and from that time until 1813, such grants were made without intermission. The first instance of a loan occupation occurred in 1654, when small plots of ground were given out for gardening purposes, on a yearly occupation, without payment of rent. Gradually larger farms were given for grazing purposes, also without payment of rent. In 1714, however, the system was introduced of requiring a small payment or contribution in kind as a recognition from the occupier of the paramount title of the Crown, but the portions of land so given out continued to be called "loan-places," and the title of the occupier continued to be of the most precarious nature. The first instance of a quit-rent occupation occurred on the 1st of January, 1708, when a quit-rent title was issued for a term of fifteen years; and from that time till June, 1811, many such titles were issued, and by several Government interdictions or advertisements (18 February, 1732, 14th April, 1747, and May, 1762) the period during which land could be held on quit-rent was limited to fifteen years, and by some of them the titles already issued were from time to time extended over a further period of fifteen years. The first instance of a grant on perpetual quit-rent occurred on the 1st June, 1812—four such grants being issued on that day. The whole question of the land tenures of the Colony appears at that time to have engaged the anxious attention of the Government, but no decision seems to have been arrived at as to whether quit-rent grants issued in future should be made perpetual, or for a limited period only. In point of fact, no other grants on perpetual quit-rent were issued until after the 6th August, 1813 (namely, on the 15th October, 1813), from which time they became more numerous than any other form of grant. Let me now consider the rights under the Roman Dutch Law, of holders of land on the different tenures already mentioned. As to *freehold*, or *property ground* (as it was formerly called), it is needless to say anything; the term speaks for itself. The perpetual quit-rent of this Colony is in all respects identical with the *emphyteusis* of the Roman Dutch Law. Voet (*Comm. ad. Pand.*, vi., 3, 3), defines *emphyteusis* as *contractus quo prædium alicui fruendum conceditur in perpetuum, aut ad tempus non modicum sub lege meliorationis et præstationis annui canonis*; and he adds that in the Dutch language it is termed *erfpacht*. This is the term by which quit-rent has always been known in this

Colony. It was used as the equivalent for quit-rent, in the Dutch version of the Proclamation as officially published in the *Government Gazette* of the time. It was also used as the equivalent for quit-rent in all grants issued until the year 1822 (in which year grants ceased to be made out in both Dutch and English), including the grant now in question. It is also the term invariably used by the Dutch-speaking inhabitants of this Colony to designate the quit-rent tenure. *Burge*, in his Commentaries (iii., p. 449), defines the *jus emphyteuticum* as a contract by which houses or lands are given to be possessed for ever, or at least for a long term, upon condition that they shall be improved, and a small annual rent or pension, *canon emphyteuticus*, either in money, grain, or any other thing, is reserved and made payable to the grantor as a recognition of his paramount title. He adds that this right originated in the desire of the proprietor to secure the improvement and cultivation of those barren or uncultivated lands for which it was not easy to procure tenants, in consequence of the expense they must incur in settling and improving them, and that it was afterward constituted in respect of lands the most fertile and cultivated. This description of the origin and progress of the tenure is peculiarly applicable to the quit-rent lands of this Colony. According to *Voet* (vi., 3, 11), the *emphyteuta* or holder on quit-rent is entitled to nearly all the rights of enjoyment which belong to an usufructuary (*ad eum omnia fere pertineant quæ ad fructuarium pertinere trademus*). *Burge* (iii., 452), says that the *emphyteuta* is entitled "to derive all those profits and benefits which belong to an usufructuary;" and he quotes as his authority the passage just cited from *Voet*, but he seems to have overlooked the force of the word *fere*, which considerably modifies the general statement. There are some important benefits belonging to the usufructuary to which the *emphyteuta* is not entitled; for example, the right to dig out potter's earth or materials for fuel (including, I apprehend, coals as well as peat), or to dig mines for metals, or quarries for stones (*Voet*, vi., 3, 11: *Non tamen emphyteutæ licitum effodere ex agro emphyteuticario terram fictilem figulinæ exercendæ causâ, aut terram combustilem, longèque minus metallifodinas aut lapicidinas lapidum haud renascentium instituere vel exercere*). On the other hand the *emphyteuta* is subject to the same burthens as the *fructuarius* (*Voet*, vi., 3, 12, *ex opposito onera quoque emphyteutam fructuarii exemplo ferre nomine rei emphyteuticariæ necesse est*). Among these burthens *Voet* mentions the following: That the proprietor is entitled, notwithstanding the usufruct, to exercise his rights of ownership, so far as the rights of the usufructuary are not disturbed (*Voet*, vii., 1, 20, *proprietary generaliter, non obstante*

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usufructu, jus suum dominii exercere potest, quatenus fructuarii jus non læditur). I may here parenthetically remark that it would seem to follow that the *dominus* having never parted with the right to iron-stone gravel (which clearly cannot be classed among *lapides renascentes*), might still have the use of the gravel if he can obtain it without injury to the *emphyteuta*. *A fortiori* would this remark apply where the Crown, as the *dominus*, grants the land on perpetual quit-rent, for there the well-known rule, as explained by Lord Stowell (1, Ch. Rob., 227, 230), would apply, that the rights of the Crown being conferred upon it for great purposes and for the public use shall not be intended to be diminished by any grant beyond what such grant, by necessary and unavoidable construction, shall take away. And if the argument be correct that the Crown has not parted with the right of taking gravel from the plaintiff's land, then the right would now, under the above-cited clauses of Act 9, of 1858, and No. 10, of 1864, be vested in the defendants. But it is unnecessary to dwell any further on this point, or to make it a ground of my decision, inasmuch as it was not urged by the defendants' Counsel, and as my opinion is clearly in favour of the defendants upon another ground. Besides the restrictions already mentioned upon the free use and enjoyment of the land by the grantees and their assigns, there were others which considerably interfered with their powers of alienation. If they disposed of the land, a fine immediately accrued to the grantor, who, moreover, became entitled, within a year after he became aware of the sale, to re-purchase the land for the same price for which it had been sold. Upon non-payment of the rent, or any part of it, for three years, the land was forfeited to the *dominus*. In other respects the rights of the *emphyteuta* to the use and enjoyment of the land were complete. It is obvious, however that such a system had very serious drawbacks. The trammels upon the free alienation of the land must greatly interfere with that permanent improvement which the Government was itself anxious to secure, and the right of re-purchase vested in the grantor must impede the cultivation of the land for a year at least after each sale, besides shaking the security of the title so long as the grantor had not received notice of the alienation. The title of the holder on loan was still more precarious. He had no right to alienate at all without the consent of the owner; and whether he alienated or not, the occupation might be determined at any time after the expiration of a year, without previous notice. The tenure differed little, if at all, from the *precarium* of the Roman Law. Such was the state of the law when, on the 16th October, 1812, Sir John Cradock issued a Proclamation, whereby he declared "That all per-

sons who had incautiously cultivated lands belonging to the Crown, shall be at liberty, pursuant to the tenor of the Interdiction of February 18th, 1732, to apply to the Government for a grant on quit-rent of such ground as may be required for the improvement or fair extension of their present property." The Interdiction of February 18th, 1732, had referred only to quit-rents for 15 years, but it is clear from the context of this Proclamation that a perpetual quit-rent was now intended, for in a subsequent clause it is declared proper "that the most legal security should be given to property, and the inestimable advantage insured of its lawful transmission to the posterity of the present occupants." It then proceeds to state that "the first step to attain these ends is to remove every doubt and uncertainty as to tenure, and to fix all persons in just and undisputed rights;" but the Proclamation itself contains nothing calculated to remove such doubt and uncertainty, or to fix the rights of occupiers. On the 23rd July, 1813, Sir John Cradock issued an advertisement by the first clause of which he "declares his intention of only granting lands for ever on a reservation of quit-rent;" but beyond directing the different land commissions "to preserve inviolate the rights of road and outspan-places to the public," it gave no indication of the conditions or regulations under which the grants would be made. Then came the Proclamation of the 6th August, 1813. Its title, as given in the volume of the Statute Law published in 1858, is "Conversion of Loan-places to Perpetual Quit-rent;" but this title was inserted by the editors without legislative authority, and did not head the Proclamation as originally published in the *Government Gazette*. The preamble is as follows: "Whereas agriculture constitutes the chief source of prosperity in this Colony, and the full encouragement thereof must consequently have an immediate tendency to promote the real interests of its inhabitants; whereas this encouragement chiefly depends on the certainty of tenures and the confidence connected therewith, that all improvements of the soil, and all increase of fertility, should indisputably belong to the holder as his own, and that in the ordinary course of things, all his arrangements, as well with respect to the produce as to the land itself, should, by the laws, be exclusively secured to him, his heirs, executors, assigns or representatives; whereas, although the establishment of loan leases might have been suitable to the early state of this Colony, when the wants of Government were not foreseen, it now appears, from experience, that the loan tenure is injurious to that certainty so essential to the happiness and the interest of the inhabitants, and equally injurious to the

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public interest, by preventing the holders from appropriating as much of their means to the improvement and extension of agriculture as they would do, in case they had no right of re-assumption to apprehend, and might dispose of the same as they please by subdividing the same among their children, letting, selling, or otherwise alienating it in lots, cultivating it in the prospect of remote benefit, by the planting of timber, &c.; whereas, notwithstanding a gradual re-assumption of loan lands, and the re-granting of the same in lesser portions on a more certain tenure, might considerably increase the colonial revenue; yet having taken into consideration the great utility of no longer delaying the improved cultivation of land by giving security to title, and of making the same, as speedily as possible, a *general measure*, I have adopted the following determination:—To grant to the holders of all lands on loan, who may regularly apply for the same, their places on perpetual quit-rent, with the following rights and privileges, and on the following terms and conditions.” Then follow seventeen clauses, some of which (namely, those which provide for the proceedings preliminary to the grant) appear on the face of them to apply exclusively to converted loan-places, whilst the rest (namely, those which regulate the rights of the grantee after the grant) are general in their terms, and can only be considered as applying exclusively to loan-places, if read in connection with the Governor’s “determination” as recited in the preamble. It is impossible to conceive a Statute more loosely drawn or more inartistically worded. Whilst the concluding paragraph of the preamble would lead to the belief that the enacting clauses would only refer to converted quit-rent lands, some of these clauses, such as the 6th and 9th, unmistakably refer to all quit-rent lands. But then again, there are some clauses like the 4th and 10th, which do not on the face of them refer to all perpetual quit-rent lands, and their meaning can therefore only be ascertained by reference to the concluding paragraph of the preamble. In regard to the 10th clause, there is no doubt that it has always been practically treated as applying to all quit-rent lands whether converted or not, for the invariable practice, of which this Court has judicial cognizance, has been to transfer them before the Registrar of Deeds, and to register them. The plaintiff’s own land now in dispute has been so transferred and registered. It is true that the 10th clause requires transfer to be passed before Commissioners of the Court of Justice, but by Ordinance No. 39, of 1828, it was expressly provided that all deeds which had theretofore been certified and enregistered before members of the Court of Justice, should thereafter be certified and enregistered before and subscribed by the

Registrar of Deeds. The 17th clause does not enact or declare any law, but it clearly shows that in the opinion of the Governor, that is, of the Legislature, this Statute was not a mere set of special regulations for altering the tenure of a limited number of farms, but a general measure of relief. The measure is described as a great one which had "long engaged the attention and anxious wish of each preceding Government," but it would have been a very small measure indeed if it had been intended to apply only to those lands which had been given on loan at a time when an infinitesimal portion of the land of the Colony was occupied and when the great bulk of the land was still vested in the Crown and lay waste and uncultivated. To attain the objects and cure the defects mentioned in the first part of the preamble, it was more important and necessary that the general regulations laid down in the enacting clauses should apply to all quit-rent lands than that they should apply to converted lands only. Reading the enacting clauses with the first part of the preamble, the concluding clause of the Proclamation, and the prior Proclamations of Sir John Cradock, it is difficult to resist the conclusion that all those enacting clauses which do not on the face of them apply exclusively to loan lands were intended by His Excellency to apply to all quit-rent lands, whether converted or not. Against this view it has been urged that the same Governor subsequently, namely in October, 1813, issued a Government Notice, whereby he himself explained the object of the Proclamation of 6th August, 1813. I have not been able to find such a notice in the *Government Gazette* of the year 1813, and the only authority for its existence is a Dutch periodical published in 1826. But even if such a Notice had been issued it would not, I apprehend, affect the decision of the present case. According to the writer in the periodical, there existed a general belief, shortly after the Proclamation, that its object was to compel the holders of loan-places to convert the tenure into quit-rent, and the sole object of the Notice (if a Notice was issued at all) was to remove this misapprehension. Still the question remains whether the language of the 4th clause of the Proclamation is not sufficiently clear and distinct so as to prevent the Court from giving effect to such other indications of the intention of the Legislature as are afforded by the previous Proclamations of the same Governor and by the Governor's own belief of the effect of his Proclamation of 6th August, 1813, as expressed in the preamble and last clause. If the grammatical sense of the 4th clause is clear, the clause should not, I apprehend, be construed by reference to other statutes (even where such statutes were, as in the present case, made

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by the same Legislature *in pari materia*) or by reference to what may be called the peroration of the Proclamation itself. Taken literally, the provisions of the 4th clause constitute some of the rights and privileges, or terms and conditions, under which the Legislature had determined to grant to the holders of all lands on loan who may regularly apply for the same, their places on perpetual quit-rent. The preamble, it is true, mentions only the determination to grant, but the 4th clause is not the less grammatically restricted to the particular kind of land mentioned in the concluding portion of the preamble. If the rules of the Roman Dutch Law (following those of the Roman Law) for the proper construction of statutes were to guide this Court, there would be no difficulty in construing the clause. "*Scire leges*," says *Celsus*, "*non hoc est verba earum tenere sed vim ac potestatem . . . Benignius leges interpretandæ sunt quo voluntas earum conservetur.*" (*Dig.*, 1, 3, 17 & 18). *Tertullianus* says: "*Semper quasi hoc legibus inesse credi oportet, ut ad eas quoque personas et ad eas res pertinerent quæ quandoque similes erunt.*" (*Dig.*, 1, 3, 27). *Julianus* remarks: "*Non possunt omnes articuli singulatim aut legibus aut senatus-consultis comprehendi; sed quum in aliqua causa sententia eorum manifesta est, is, qui jurisdictioni præest, ad similia procedere atque ita jus dicere debet.*" (*Dig.*, 1, 3, 12). And *Ulpian* writes as follows: "*Quoties lege aliquid unum vel alterum introductum est, bona occasio est, cetera quæ tendunt ad eandem utilitatem, vel interpretatione, vel certe jurisdictione suppleri.*" (*Dig.*, 1, 3, 13). *Voet*, in his Commentaries (1, 3, 20, *et seq.*), adopts these rules to their full extent, and argues in favour of the extensive interpretation of a law by extending it to similar cases wherever there is a perfect similarity of reason or of principle. He also quotes with approval the following passage from *Cicero*: (*In Topicis*, n. 22), "*Quod in re pari valet, valeat in hac quæ par est. . . . Valeat æquitas quæ paribus in causis paria jura desiderat.*" But in construing statutes made in this Colony after the cession to the British Crown, this Court should, in my opinion, be guided by the decisions of the English Courts, and not by the Roman Dutch authorities. It is, no doubt, quite true that the Proclamation of 6th August, 1813, is more like an edict of a Roman Emperor than a modern Act of Parliament, and that it bears evident traces of having been originally drawn by a Dutch lawyer in the Dutch language; but as it officially issued from an English Governor in the English language, it must be subject to the rules of construction laid down for English statutes by the decisions of English Courts of Law. Some of the older decisions of these Courts lay down rules which bear a close

similarity to those of the Civil Law. "Every statute," says Lord Coke, "ought to be expounded, not according to the letter but according to the meaning: *qui hæret in literâ hæret in cortice*." There seems no doubt, however, that the enlarged or extensive interpretation of statutes which was admitted in former times has given way (except it would appear in old statutes) to a strict observance of the literal and grammatical sense of the words employed. The current of modern decisions seems to be in favour of considering the literal meaning of the words in which the statute is expressed as the primary index to the intention with which the statute was made, and to abide by the literal meaning even where it varies from other indications of the actual intention of the Legislature. In deference to these decisions, I incline to the opinion (not, however, without grave doubts) that according to the legal construction of the 4th clause of the Proclamation it does not apply to land granted on perpetual quit-rent without previous occupation on loan, unless, of course the grant itself contains a provision admitting of its application. The next question is whether the grant of the land now under consideration does or does not contain such a provision. It is not disputed that if this question be answered in the affirmative, the provision would, by the law of this Colony, be as binding upon the plaintiff as upon the original grantee. Indeed, it is part of the plaintiff's case that the 6th and 11th clauses of the Proclamation, which direct that the laws relating to freehold lands should apply to quit-rent lands, should be included among the duties and regulations subject to which his land was originally granted. Why then should the 4th clause be excluded? The answer given is two-fold. Firstly, it is said that a right such as that which is claimed by the defendants is not favourable to the grantee, and that its existence must therefore be clearly proved by the express terms of the grant. There would perhaps have been some force in this objection if the grant had been made by a private individual instead of the Crown; but, setting aside this distinction, it should be borne in mind that the very clause of the Proclamation which reserves and secures to the Crown the right in question, confers on the grantees, as has already been shewn, some valuable rights and privileges which they would not have enjoyed if the general regulations laid down in the Proclamation had not always been considered as forming part of the regulations subject to which all perpetual quit-rent lands have been granted. Secondly (and this is the plaintiff's main argument), it is urged that the duties and regulations referred to in the concluding provision of the grant can only mean duties and regulations in respect of lands granted on

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quit-rent without previous occupation on loan, inasmuch as the word "*granted*" in the expression "granted under similar tenure" excludes the possibility of a previous occupation on loan. This, however, appears to me to be a complete mistake. The loan tenure conferred no title, legal or equitable, on the tenant. It was only after conversion into quit-rent that a *grant* of the land could be made by the Crown. Indeed, the Proclamation itself uses the term "grant" as the mode in which conveyance of converted quit-rent lands should be effected. The endorsement on the *grant* to the effect that the tenure had been converted is the only feature to distinguish converted quit-rent lands from lands immediately granted on quit-rent, nor is it by any means clear that such an indorsement has invariably been made on grants of converted quit-rent lands. But according to Mr. Marquard, one of the plaintiff's witnesses, "there is no difference in the form of tenure between loan places converted into quit-rent and those originally granted as such." The tenure in both cases is perpetual quit-rent, although the mode in which the tenure has been acquired may be different. The grant to Dell, from whom the plaintiff derives his title, expressly provides that the land so granted shall be subject to all such duties and regulations as are already established respecting lands granted under similar tenure. It is said that a similar clause is inserted in all other grants of land made in this Colony; but that is not a sufficient reason why the Court should not endeavour, if possible, to attach some meaning to the provision in the grant now in question. "I apprehend," says Mr. Justice Byles in *Hayne vs. Cummings* (16, C. B., n. s., p. 427), "it is a sovereign rule in the construction of all written documents to give effect, if possible, to every word, or, at all events, to every provision," and he quotes some quaint remarks of Lord Hobart in the *Earl of Clanrekind's Case* (*Hob.*, 277), where he says: "I do exceedingly commend the Judges that are curious and almost subtle, . . . to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act." From what I have already said, it is abundantly clear that wrong and injury would be wrought if the Crown and the owners of quit-rent lands should now be thrown back upon their rights under the Roman Dutch Law, instead of being allowed, under the concluding provision of the quit-rent grants, to take advantage of Sir John Cradock's beneficent regulations. For more than sixty years these regulations appear to have been acquiesced in by all parties. At all events, not a single instance has been given in which the Crown has ever claimed a fine upon alienation,

or enforced a forfeiture upon non-payment of quit-rent, or asserted any other right inconsistent with the regulations. On the other hand, no instance could be adduced in which the owner of a quit-rent land had disputed the right of the Crown, or of the Commissioners of Roads, or of the Divisional Councils to take gravel from the land for the purpose of making or repairing public roads, although this right must always have been freely exercised. Mr. De Wet, one of the plaintiff's own witnesses, who has been chief clerk in the Surveyor-General's Office for thirty-three years, says he does "not remember that the right of the Government to take gravel from quit-rent land originally granted as such was ever disputed." For the last twenty years the defendants have been taking gravel from the very land now in question, out of the quarry marked No. 1 on the plan; and it was not until after the plaintiff had been in possession for nearly eight years that the first formal objection was raised. Even then the objection was not to the taking of gravel at all, but to the particular spot at which it was taken out. Afterwards, however, the plaintiff altogether objected to any gravel being taken from his land. The objection cannot, in my opinion, be sustained. If the above cited provision in the grant was intended to allow the grantee to share in the benefits conferred by Sir John Cradock's regulations, it must also, according to the ordinary rules of construction, have been intended to subject him to the burthens thereby imposed. If, under that provision, the plaintiff can claim that the laws relating to freehold lands shall guide the Court, he can only rest his claim on the 6th and 11th clauses of the Proclamation. He has already, under the 10th clause of the Proclamation, obtained the benefit of a safe title by means of the registration of his own deed of transfer and all the preceding title deeds through which he derives his title. By the law of this Colony such registration constitutes notice to all the world of these title deeds and their contents. It cannot be denied that the Governor, Lord Charles Somerset, who in 1815 granted the land to Dell, had the power to impose the servitude and confer the privileges referred to in the 4th clause of Sir John Cradock's Proclamation. Why then did he not specially mention them in the grant? The answer is, I conceive, a simple one. Only two years before the date of the grant the Proclamation had been issued, containing certain *special* regulations which provide for the proceedings preliminary to the granting of loan places on perpetual quit-rent, and appear on the face of them to apply exclusively to loan places, and certain *general* regulations which settle the rights of the grantees and their assigns

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after the grant. Instead, therefore, of inserting all these general regulations into the grant, the form already in use was retained, providing that the land should be "subject to all such duties and regulations as either are already or shall in future be established respecting lands granted under similar tenure." Under all the circumstances of this case, I am clearly of opinion that the duties and regulations mentioned in the grant include, and were intended by the grantee as well as the grantor to include, the right of the Crown to take gravel from the land for road purposes; that the plaintiff, having taken a registered transfer, holds the lands subject to the same right; and that the defendants being now invested with that right ought not to be condemned in damages for acts done in the exercise of the same, or restrained by perpetual interdict from hereafter exercising the same. It has been urged that if the defendants' claim to the right of digging gravel on the plaintiff's land were to be sustained, his land would be rendered valueless. If the right legally exists, the Court cannot inquire into the consequences which would result from the exercise of the right. But is it a fact that the plaintiff's land would be rendered valueless? The defendants do not deny that they are bound to use their right in a reasonable manner, and to fill up the excavations after gravel has been taken out, nor is the present action founded upon an unreasonable exercise of their right on the part of the defendants. Moreover, under the 12th clause of Act No. 9, of 1858, read together with the 3rd clause of Act No. 10, of 1864, the defendants are bound to give compensation for the use of any land or the taking of materials from any land which the Government may have a legal right to use, but which has been improved by cultivation, irrigation or otherwise, and the method of determining the amount of compensation is provided for. There is no reason to suppose that under these Acts the plaintiff would not be liberally compensated. The plaintiff, anticipating perhaps that the decision of the Court might be adverse to him upon his claim for damages, and a perpetual interdict, concludes his declaration with the alternative prayer that "should it be found that the defendants have any right to remove gravel, stones, earth, or other matter or thing from the said land, it may be declared by the Court that such right cannot be exercised with respect to cultivated, arable, or sowing lands without compensation to the plaintiff;" but there is no allegation in the declaration that land of this description has been used by the defendants, and the evidence leaves the matter very doubtful. There can be no objection, however, to a judicial declaration to the effect that the

defendants are not entitled to take materials from such portions of the plaintiff's land as have been improved by cultivation, irrigation, or otherwise, without compensation to the plaintiff—such compensation to be determined in the manner provided for by the 12th clause of Act No. 9, of 1858; but I am of opinion that the defendants are entitled to their costs.

DENYSSEN, J., after stating the pleadings, said:—It is beyond dispute that the mainroad to D'Urban runs right across the two pieces of quit-rent land originally granted to Dell, and subsequently transferred to plaintiff, and that the ground from which the gravel has been dug and carried away is situated on the right and left of the road on the said land. The ground from which the gravel was taken had been cultivated, and, according to plaintiff, part of the land had been prepared for sowing in the proper time and season. The whole extent of the ground granted is very inconsiderable. It will also be observed that the defendants do not limit their right to remove gravel from any particular portion of the land, but claim the right, as by law entitled, to dig, get, and carry away stone, clay, or other materials, from any portion of the said lands of the plaintiff. The grant made to Dell was on perpetual quit-rent, subject to such duties and regulations as either are already, or shall in future, be established respecting lands *granted* under similar tenure. It must be observed here that the words used are *granted under similar tenure*. And here it is of importance to refer to the land tenure in this Colony from the earliest date. We find that, originally, land was held in this Colony on loan. This existed in 1654, when small lots of ground were allowed on that tenure for gardening, after that for grazing of cattle, and subsequently for general purposes, on payment of rent. But even at that time there appeared to have been a growing desire to obtain a better title, as may be seen from one of the resolutions of the Government for the time being of the 1st October, 1654; and we consequently find that in 1657 the tenure in freehold was introduced. But it was not until the 18th February, 1732, that the tenure by quit-rent for a period of fifteen years was established, the lands so held being resumable by Government, lands held on loan at the expiration of a year, and on quit-rent at the expiration of the fifteen years for which they were granted. According to Mr. Marquard, of the Surveyor-General's office, the first quit-rent title for fifteen years is in 1808, 1st January, exactly the same as in freehold as regard its conditions and stipulations. On the 6th December, 1811, Governor Sir John Cradock wrote to the Secretary to Government, expressing

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an intention of recommending to Her Majesty's Government in future to grant waste lands in perpetuity, upon an annual payment of a quit-rent. On the 23rd December, 1811, Secretary Bird wrote to the Governor, admitting evils of tenure of loan lands, and suggesting the application of a general remedy, but believes this course to be forbidden by opinion expressed by Her Majesty's Privy Council. On the 13th January, 1812, he requests the opinion of Fiscal Truter (1) respecting the nature and form of tenure most desirable in future grants; (2) the practicability and expediency of making such alterations in present tenure upon which *loan places* are held as would give the holder a complete property therein, upon terms of mutual advantage to Government and the parties. On the 11th February, 1812, Fiscal Truter reports opinion, "as loan places and fifteen years' quit-rent are subject to uncertainty, being resumable by Government," the grants be in future perpetual quit-rent; that loan places and fifteen years' quit-rents should be converted into perpetual quit-rents wherever no particular reason can be given to the contrary, and he proposes certain rules for effecting this conversion, and *inter alia* the right of reservation on the part of the Government of making roads and raising materials for the same. On the 4th March, 1812, Governor Cradock transmits Truter's reports to Earl Bathurst, and states that he desires in future to adopt quit-rent for new grants, as well as in exchange for *loan places*. On the 16th October, 1812, Governor Cradock published a proclamation expressing an intention of granting Government lands on quit-rent. On the 26th November, 1812, Earl Bathurst transmits to Governor Cradock letter of Lords Committee of Trade, and requests the Governor's conduct to be guided thereby. They approve of converting of *loan lands* into perpetual quit-rent. On the 20th July, 1813, the Governor declares his intention of granting lands for ever on a reservation of a quit-rent. On the 6th August, 1813, Governor Cradock issues the proclamation entitled "Conversion of *loan places* to perpetual quit-rent," condemning the tenure on *loan*, and declaring that he has adopted the following determination: To grant to the holders of all land on *loan* who may regularly apply for the same, their places on perpetual quit-rent, with the following rights and privileges, and on the following terms and conditions, which are specified, one of the conditions being that the Government reserves to itself the right of making and repairing public roads, and raising for that purpose, materials on the premises. As it appeared, however, that there existed some misapprehension of the intention of the Government respecting the Proclamation of the 6th August, 1813, a

Government Notice was published on the 18th October, 1813, explaining that the object of the Government with reference to the Proclamation of the 6th August, 1813, was to give to all parties who were desirous of converting their *loan places* to perpetual quit-rent the opportunity of so doing. That it must be considered as a special favour; but that it is optional for the parties concerned. Nobody is forced to do so. Now throughout all the correspondence between the local Government and the officers here (except in the report of the Fiscal Truter, to which reference hereafter), and the local Government and the Imperial Government; throughout all the Government Notices and Proclamations commencing in December, 1811, and terminating in October, 1813, not the slightest allusion is made to the conversion of the fifteen years' quit-rent into perpetual quit-rent. The tenure on *loan* only was referred to and condemned; and by the Proclamation of the 6th August, 1813, the Government declared to have adopted the determination to convert *loan places* into perpetual quit-rent upon certain specified conditions and stipulations; and to prevent any misunderstanding the Government even then explained it would not force parties so to convert their *loan places*, but left it to their option to do so or not. The question put to the Fiscal Truter was as to the nature and form most desirable in future grants; and the practicability and expediency of making such alteration in the present tenure upon which *loan places* are held, as would give the holders a complete property therein, and in his reply he recommends that *loan places* and fifteen years' quit-rent should be converted into perpetual quit-rents; but as regards the last part of the recommendation, no notice was taken of it, the Government confining its attention and desire to the conversion of *loan places*, and to that tenure alone. It is said that the construction of some of the terms and conditions upon which the conversion of *loan places* was to be effected will admit of their being made applicable to original quit-rent grants, and that it was the intention of the Government they should be. The latter I deny, nor can I see the force of such reasoning. These terms and conditions are not favourable to the holder of the quit-rent land, certainly not as to the reservation respecting the right to remove gravel, &c.; and I have yet to learn that under such circumstances, either a forced construction, or a condition not expressed, but very ambiguous, must be accepted to the quit-rent holder's prejudice. The first quit-rent title for fifteen years is in 1808, 1st January, exactly the same as in freehold as regards conditions and stipulations. In freehold grants there is no reservation on the part of the Government to make roads and raise material for the

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same on the premises; such a right has never been claimed or its existence ever contended for. In the grant to Dell in 1815, the land is further subject to all such duties and regulations as either are already or shall in future be established respecting lands granted under similar tenure. What is that tenure? A tenure granted on loan? Certainly not. A tenure granted originally on loan converted into perpetual quit-rent? Certainly not, but a tenure granted originally on quit-rent as in 1808, exactly on the same conditions as in freehold, and as I know of no other duties and regulations applicable to such quit-rent tenure, and the condition now in question is not applicable to freehold, I cannot enforce servitudes that are onerous and odious, and cannot be entertained excepting they be clearly established. The servitude claimed in this case is particularly odious and onerous. The plaintiff owns a very limited extent of ground, which is used partly for grazing, and partly for sowing purposes. The gravel pits dug upon the same, deprive him of no small extent of his grazing and sowing lands, and if the claims of the defendants are entertained, they would virtually be at liberty to quarry gravel on any part of this limited extent of land and render his farm valueless; and that upon the assumption of the existence of a servitude which a forced and unreasonable construction of one of the conditions upon which loan lands are converted into perpetual quit-rent is supposed to justify, or upon the ground that it was evidently the intention of the Government, although that intention has never been expressed. The *jus emphyteuseos* has also been referred to. It has nothing to do with this case. The grant of the land to Dell in 1815 cannot be governed by the *jus emphyteuseos*. It was made on perpetual quit-rent, subject to certain conditions. Do they or any one of them entitle the defendants, as representing the Government in this case, to dig and carry away any stone or gravel from the land without the owner's leave or license? I say no! The Proclamation of 6th August, 1813, does not apply to the original quit-rents, but only to loan places converted into perpetual quit-rents; and there must therefore, as I am advised, be judgment for the plaintiff as prayed, with costs.

FITZPATRICK, J.:—I have carefully considered this question and conferred with my brother Judges upon it, and the result is, that I agree with Mr. Justice Denyssen that judgment should be for plaintiff. Mr. Justice Denyssen has gone so fully into the reasons which guided us that it is unnecessary for me to do so. I may, however, say, that the principle which presented itself most prominently to me was, that this is a servitude which is claimed by the defendants, and its terms must be most strictly construed. There

is no express servitude in the grant, and we cannot burden land with a servitude derived from an argumentative construction of a document.

Judgment accordingly for plaintiff, with costs.

[Plaintiff's Attorney, C. C. DE VILLIERS.]
[Defendant's Attorney, MOORE.]

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ANDERSON & Co. vs. HUTTON & Co.

Compulsory Sequestration.—Act of Insolvency.—Ordinance No. 6, 1843, secs. 4, 9.

Where a member of a partnership firm gives promissory notes bearing the signature of the firm, and discounts these notes, and applies the proceeds to his own use, and with intent or in such manner as to defeat or delay the creditors of the firm allows the holders of these notes to obtain provisional sentence thereon and to attach the partnership assets, this is such an "alienation" within the meaning of the 4th section of the Insolvent Ordinance as to amount to an act of insolvency by the partnership.

The estate of John Thomas Hutton and Jan Marthinus Hoets, now or lately carrying on business at Cape Town under the style or firm of Hutton and Co., was provisionally placed under sequestration by an order of Court obtained on the 3rd June, at the instance of Messrs. W. Anderson & Co. The said partners were thereupon summoned to appear this day (June 10), to show cause why their estate should not be compulsorily sequestered.

The petition upon which the order was obtained stated that plaintiff had, about two years ago, established the defendants in business as shipping and landing agents, and supplied them with a stock in trade, costing £2,200, besides from time to time giving them assistance in cash. That Hutton was to keep the books, and Hoets was to attend to all outdoor work. That Hoets honestly, diligently, and laboriously attended to his department, but that Hutton grossly neglected his duty in the said business, which was now ruined. That Hutton kept no books or accounts, and had signed the name of the firm to divers promissory notes, as makers or indorsers, for large sums of money, which notes he had used and appropriated in manner unknown to his

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partner, and without his previous knowledge and consent; and that he had further misappropriated to his own uses money received in the name of the firm for the use and benefit of third parties. That the firm had been summoned on promissory notes which they had no means of paying, and that the goods supplied by plaintiffs, and not yet paid for, had been seized in execution and were advertised for sale. That Hutton had incurred liabilities, in the name of the firm, with one discounters alone to upwards of £500. That the estate of the partnership was utterly insolvent through the fraudulent practices of the said Hutton. That Hoets, to save the estate from being wasted in executions, had endeavoured to surrender it as insolvent, but that Hutton through malicious and fraudulent desire refused to consent to such surrender. That by his proceedings Hutton has meant and intended to make, and unless checked will succeed in further making, an alienation of the goods and effects of the firm in favour of certain creditors who had become creditors of the firm by his fraudulent use of the firm's name, with the object and intent to benefit and prefer them above the just and lawful creditors of the firm. That the debt due to the plaintiffs amounted to £1,829 17s. 10d.

Jacobs, A. G., for the applicants, put in several affidavits in support of the allegations contained in the petition. He contended that the giving of partnership notes for private use, and suffering judgment on these notes, and execution to issue against partnership property, with intent or actually to prefer private creditors, was an act of insolvency.

Cole, for the respondent Hutton, read answering affidavits denying the allegations as to the books and the conduct of Hutton; and stating that various notes signed or endorsed with the firm's signature were discounted by private individuals and the proceeds used for partnership purposes. Further, that Hutton believed the partnership to be solvent. He argued that no act of insolvency had been committed.

Buchanan appeared for the respondent Hoets to consent to an order of sequestration.

DE VILLIERS, C.J. :—There is an express allegation that Hutton had given promissory notes bearing the name of the firm for his own use and benefit, and that he had received the proceeds of these notes; and that the persons who discounted them had taken in execution the goods of the firm, with the tacit concurrence of Hutton. That was virtually an "alienation" of the firm's property within the meaning of the 4th section of the Insolvent Ordinance. Though he had ample opportunity yet Hutton had not denied either the allegation that he discounted these notes

for his own use, or that he intended to defeat or delay the creditors of the firm, which was distinctly alleged in the petition. Neither has he said one word in answer to the allegation charging him with fraud. I am of opinion that under the 4th section of the Ordinance, taken in conjunction with the 9th section, an act of insolvency has been committed.

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DENYSSEN, J., and FITZPATRICK, J., concurred.

Sequestration adjudged accordingly. Costs to come out of the estate.

[Applicant's Attorneys, FAIRBRIDGE & ARDERNE.
Respondent Hutton's Attorney, BUISSINNE.
Respondent Hoet's Attorneys, FAIRBRIDGE & ARDERNE.]

BOSMAN vs. DE VILLIERS.

Witness' expenses.

The Court confirmed the Master's taxation of the plaintiff's costs, allowing the expenses of a witness from the country who had not arrived in town by the day on which the case was set down, though not called on for trial, but the case having been referred to arbitration, arrived before the sitting of the arbitrators, although his evidence was rendered unnecessary in consequence of admissions made to the arbitrators by the attorneys.

A witness is entitled to a personal allowance in addition to his actual travelling expenses.

Notice was given by the defendant in the case of Bosman vs. De Villiers of an application to the Court to review the Master's taxation of the plaintiff's bill of costs, and to have disallowed the charges allowed by the Master to one J. S. O. Brink purporting to be a witness in the said cause, on the grounds that the said Brink was no witness in the cause; that he was not present on the day the case was set down for trial; that the cause was heard before arbitrators, and the said Brink was not examined, the questions at issue having been decided on documentary evidence; and that Brink, prior to his departure from Richmond had notice his attendance would not be required. It was further objected, that if it was considered Brink was entitled to his expenses the amount allowed was excessive and should be reduced.

Buchanan, for the defendant, in support of the application, put in several affidavits, stating that a written notice

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had been posted by defendant at Murraysburg on the 30th November, to Brink, at Richmond, stating it would be unnecessary for him to proceed to town, as an arrangement had been come to and the notice of trial was countermanded; that the case had been set down for trial on the 8th December, but that Brink did not leave Richmond, where he resided, till too late to arrive in town by the trial day: that in fact he did not arrive in town until three or four days after the 8th December; that he was not examined nor was his evidence tendered to the arbitrators; that Brink had sent in a bill for £134 13s., charging all travelling, hotel, and other expenses, and a personal allowance for thirty days at £2 2s. a day from 4th December, 1874, to 4th January, 1875, which bill the Master taxed and allowed at £100 9s. 6d; and that the arbitrators sat on the 23rd and 24th December, and made their award on the last mentioned day.

Cole, for the plaintiff, read answering affidavits, from which it appeared that the case had frequently been set down for trial between February and December, but had as frequently been withdrawn at the urgent request of defendant's attorneys, on the assurance that the defendant would comply with the plaintiff's demand, which was to render certain accounts; that the case was at length set down for trial on the 8th December by default; that arbitration was offered, but not accepted; that although Brink did not arrive in town until after the 8th December, owing to the arrangements of the passenger wagons, the case was not called that day owing to other business taking precedence; that before it could be called, Brink arrived, and about the same time defendant sent his authority to submit to arbitration, but not till then did the defendant so agree. The affidavit of Mr. Brink averred that he was a produce merchant, residing at Richmond, and that at the time it was greatly inconvenient to come to town; that his departure had been delayed by swollen rivers; that he arrived on the 12th December when the case was still on the roll; that he was out of pocket by the reduction of his account to £100 9s. 6d; and that he did not receive the letter referred to by defendant, until after his arrival in Cape Town; but even if he had received it earlier, after the experience of defendant's representations and promises, he would not have felt himself warranted in listening to such a letter from the defendant.

Several answering affidavits were also read.

The Court inquired from the Master the practice as to allowing personal expenses.

The Master stated the practice of his office to be, to allow witnesses in civil cases a personal allowance according to the station of the witness, in addition to actual expenses out of pocket.

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The Court held that under the circumstances disclosed Mr. Brink was entitled to his witness' expenses. As to the amount, the practice stated by the Master seemed a reasonable one, that persons coming from a distance should have a personal allowance, as well as their actual charges being paid.

Application refused accordingly, with costs.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.]
[Defendant's Attorney, DE KORTE.]

McLOUGHLIN vs. IMPEY.

Witness' expenses.—Act No. 4, 1861, sect. 8.—*Libel: intent.*

In an action for a libel contained in an article in a newspaper, the defendant having been subpoenaed to prove that the plaintiff was not the person to whom he alluded in the article complained of, and the case having been withdrawn before trial by the plaintiff, the Court refused to allow defendant his expenses as a necessary witness, under section 8, of Act No. 4, 1861, as evidence of intent, to prove which the defendant had been subpoenaed, would have been inadmissible at the trial.

The plaintiff had sued defendant for damages in respect of an alleged libel which appeared in a newspaper conducted by the defendant at Port Elizabeth. After pleadings were closed, the case was set down for trial on the 16th February, and notice to that effect duly given to the defendant. Defendant's Counsel advised that defendant, among other witnesses, should be present at the trial to give evidence in support of a special plea, that the plaintiff was not the person to whom defendant alluded in the article complained of. Defendant was thereupon duly subpoenaed and left Port Elizabeth by steamer to be present at the trial. On the same day plaintiff gave notice that he had withdrawn his action, but this notice was not given in time to prevent the defendant from leaving Port Elizabeth.

1875.
June 10.
McLoughlin vs.
Impey.

Buchanan (for Ross-Johnson) now applied to the Court to certify, under section 8, of Act No. 4, 1861, for defendant's expenses as a necessary witness.

1875.
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Jacobs, A.G., (with him *Cole*) for the plaintiff, opposed, on the grounds that the defendant not having been called, it was impossible for the Court to certify he was a necessary witness; and had he been called his evidence would not have been admissible. It was immaterial to whom the defendant meant to allude, as his meaning would have to be gathered from the words used, and the sense in which they were understood by the persons who read them. (*Hankinson vs. Bilby*, 16, *M. and W.*, 442; *Duke of Brunswick vs. Harmer*, 3, *Car. and Kir.*, 10; *Horstok vs. Boniface*, 1, *Menz.*, 467).

The Court held that the evidence of the writer of the article as to what he intended thereby would not be admissible. The words used must be taken according to their true meaning, and in the sense they would be understood by the readers. The Court could not under these circumstances certify that the defendant was a material and necessary witness.

Application refused accordingly, with costs.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.]
[Defendant's Attorneys, REID & NEPHEW.]

PRETORIUS vs. THE DIVISIONAL COUNCIL OF RICHMOND.

Resident Magistrate ex officio Chairman of Divisional Council, disqualified from trying case against said Council.

A Resident Magistrate, who is also in his capacity as Civil Commissioner the Chairman of the Divisional Council, has such an interest as to disqualify him from trying an action brought in his Court, to which the said Divisional Council is a party.

1875.
June 10.
Pretorius vs.
The Divisional
Council of
Richmond.

Plaintiff brought an action of damages in the Court of the Resident Magistrate of Richmond, against the Divisional Council of Richmond, for losses sustained through detention of his wagon and oxen, owing to the neglect of duty of the said Council in not keeping certain roads and drift across a river in a proper state of repair.

The Secretary of the Council appeared to defend the action, and excepted that the presiding Magistrate was chairman of the Divisional Council, and consequently a party to the suit as co-defendant.

The plaintiff stated that he had no objection to the jurisdiction of the Court.

The Magistrate overruled the exception. Further exceptions were also taken and overruled, and the case was tried on its merits, and judgment given for plaintiff for £2 damages with costs. The defendants now appealed.

Jacobs, A. G., for the appellants, maintained that the exception taken was a valid one, and ought not to have been overruled. By section 60, of Act No. 4, 1865, the Civil Commissioner was *ex officio* chairman of the Council, and by section 63, he had an original or deliberative vote in all matters, though not a casting vote. It was contrary to principle that a man should decide his own case.

Buchanan, for the respondent, appeared to support the judgment. The interest possessed by the Civil Commissioner as chairman was purely an official one, and not sufficient to disqualify him from sitting as Magistrate. If the Magistrate had chosen to try the case he was competent to do so, and had he felt he had any interest he would probably have retired.

DE VILLIERS, C.J. :—This objection having been taken at the trial, the Magistrate should have allowed it. I do not think he had any feeling one way or the other, but the administration of justice ought to be pure. It cannot be pure and above suspicion if a Magistrate or Judge who tries a case be directly or indirectly interested in it one way or the other. In this case the Magistrate had actually signed the warrant of attorney to appeal against his own judgment.

DENYSSEN, J., and FITZPATRICK, J., concurred.

Appeal accordingly allowed, with costs.

[Appellant's Attorneys, BERRANGE & DE VILLIERS.]
[Respondent's Attorney, VAN ZYL.]

ALEXANDER & Co. vs. LIONI.

Insolvency.—Foreign Sequestration: effect-of.

The sequestration of defendant's estate as insolvent in the Province of Griqualand West, and the proof by the plaintiff on the estate there situate, of the debt due to him, which debt had been incurred in this Colony, is no answer to an action brought here by the plaintiff for the amount due to him by the defendant.

The plaintiff sued defendant in an action of debt to recover the sum of £621 10s. 11d., the balance of an account for goods sold and delivered during the months of September and October, 1873.

1875.
June 12.

Alexander & Co.
vs. Lioni.

1875.
June 10.
Pretorius vs.
The Divisional
Council of
Richmond.

1875.
June 12.
Alexander & Co.
vs. Lioni.

The defendant pleaded, except as admitted, generally; then specially, that before and at the time alleged in plaintiff's declaration he carried on business in Griqualand West as a general dealer; that the plaintiff well knowing the premises, under a contract entered into at Cape Town, sold and supplied the goods mentioned for the purposes of the said business; that thereafter the defendant having, by misfortune, and without fraud or dishonesty on his part, become insolvent, he was compelled and did on the 27th March, 1874, make a full and fair surrender for the benefit of his creditors, including the plaintiffs, of the whole of his estate and effects, and that his estate was thereupon placed under sequestration as by the law of the said Province of Griqualand West was required: that at meetings of creditors under the sequestration, the plaintiffs had proved the claim now in suit upon defendant's estate, and thereafter in the liquidation and distribution account, duly filed and confirmed as by law required, the sum of £73 19s. 2d. was awarded to the plaintiffs on account of the claim so proved; that the Ordinance No. 6, 1843, was the law of the Province of Griqualand West regulating the procedure in regard to estates in that province placed under sequestration; wherefore the defendant submitted that the plaintiffs ought not to have and maintain their action.

The plaintiffs excepted to the special plea as being bad and insufficient, and disclosing no defence.

Jacobs, A. G. (with him *Jones*), for the plaintiff, supported the exception. There was no case on the books to show a debtor who had not obtained his discharge could set up his insolvency in a foreign country as a defence to a suit in this colony. In *Frith vs. Wollaston*, 7, *Exch.*, 194, our insolvent law was pleaded as a bar to a suit instituted in England, and it was decided it only suspended the remedy, but did not discharge the debt.

Buchanan, for the defendant, contended that the law of this Colony and that of Griqualand West being the same, the plaintiffs had no greater remedy than was allowed by the provisions of the Insolvent Ordinance, in pursuance of which they had filed their claim on the defendant's estate. By that Ordinance, sequestration was a bar to such an action as the present, and the creditor could only follow the remedies allowed by that law, and that only up to the time of the debtor obtaining his rehabilitation. The discharge in Griqualand West of the insolvent would bar the creditor suing for the debt here. (3, *Burge*, 924, 928.)

The Court sustained the exception with costs.

Defendant having no other defence to the action, there-

upon submitted to judgment for the amount claimed, less the dividend paid by his estate in Griqualand West.

Judgment for plaintiff accordingly, with costs.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.
Defendant's Attorneys, BERRANGE & DE VILLIERS.]

1875.
June 12.
Alexander & Co.
vs. Lioni.

TRUSTEE OF THORNE vs. FRIEDLANDER.

*Insolvency.—Undue Preference.—Indemnity.—Ordinance
No. 6, 1843, secs. 84, 88, 90.*

Where the payment of a promissory note by a debtor shortly before insolvency is an undue preference, made with the intention of preferring not the holder but the endorser of the note, the holder, who has bona fide given up the note to the debtor, may be compelled to refund the amount received by him to the trustee of the debtor's insolvent estate, but such trustee must give the holder an indemnity, in terms of the 90th section of the Insolvent Ordinance.

Isidor Friedlander, the defendant, was summoned in the Circuit Court for Graff-Reinett to answer Frederick Thomas Powrie in his capacity as sole trustee of the insolvent estate of Samuel Thorne, in an action to set aside a certain undue preference.

1875.
June 14.
Trustee of
Thorne
vs. Friedlander.

Plaintiff's declaration set forth that Thorne surrendered his estate as insolvent on the 15th September, 1873. That in the previous month of August, Thorne paid, alienated, ceded, and delivered to defendant, who accepted and received the same, the respective sums of £39 8s. 6d. and £567 10s., Thorne at the time contemplating the sequestration of his estate as insolvent, and intending thereby to prefer the defendant before his other creditors. That such undue preference was received by the defendant through a collusive arrangement, mutual understanding, and common consent between Thorne and the defendant, the one to give and the other to receive such undue preference. Wherefore the plaintiff prayed, in terms of the 84th and 88th sections of the Insolvent Ordinance, that the said payment should be declared an undue preference and null and void, and the defendant adjudged to return the said sums to the plaintiff for the benefit of the insolvent estate, and the defendant debarred from proving on the estate, and his claim forfeited; and for further relief, and costs.

The defendant pleaded the general issue.

1875.
June 14.
Trustee of
Thorne
vs. Friedlander.

At the trial in the Circuit Court on the 10th September, 1874, the claim for £39 8s. 6d. seemed to have been abandoned, as no evidence was led to support it. The surrender of Thorne's estate on the 15th September, 1873, was admitted, and the plaintiff gave evidence that the estate was insolvent at the date of the alleged preference. From the liquidation account, it appeared that the claims proved amounted to £1,733 5s. 11d., and the dividends awarded to £163 15s., showing a deficiency of £1,589 10s. 11d., the principal creditor being D. Benjamin, who proved for £1,604 5s. 9d. Thorne resided at Aliwal North, and defendant at Middleburg, and the whole transaction between the two was conducted by correspondence. On the 3rd March Thorne wrote to defendant asking for a loan of £500 and offering if desired a preferent bond as security. Defendant replied on the 22nd March, agreeing to lend the money on a promissory note at four months for £532 10s. if the note was endorsed by one Brooks, brother-in-law to Thorne, and personally known to defendant. This was agreed to, and the money was advanced, defendant writing that at the expiration of the four months Thorne was to remit as much money as he could conveniently spare, with a new bill in favour of Brooks to renew for the balance. When the note for £532 10s. fell due in July, Thorne sent a renewal endorsed by Brooks for the whole amount, adding interest and commission, in all amounting to £567 2s. 3d. This second bill was dated 12th July, and would fall due on the 12th November. Defendant accepted the renewal and returned the first bill to Thorne as duly retired. On the 4th August, Thorne sent defendant a cheque for £200, simply stating it was "on account of promissory note;" and on the 18th August he wrote to defendant: "confirming my respects of the 4th instant, with enclosure of £200, I now beg to enclose your promissory note in my favor drawn by D. W. Farley, four months from 1st instant, £367 10s. This will more than cover the promissory note £532 10s. The promissory note £567 10s. you will please return to me per return post, as I wish the £200 and the enclosed promissory note to be the closing up of the £532 10s. promissory note. Mr. Brooks will endorse the promissory note enclosed if necessary." Brooks did endorse Farley's promissory note, and the defendant returned the note of £567 2s. 3d. to Thorne by letter on the 5th September. From the oral evidence it appeared that Thorne supported a trader named Hertz, Thorne in his turn being supported by Benjamin. Hertz was being pressed for his liability to Thorne in July, 1873, and afterwards failed. Thorne sold goods to Farley on the 1st August, for which the note for £367 10s. was

given. This bill was retired when it fell due by a renewal given by Brooks to Thorne directly. The defendant stated that he looked to Brooks throughout, and he had not heard of Thorne being in insolvent circumstances until the surrender of his estate had taken place. On the 25th August Thorne wrote to Benjamin stating his inability to meet his engagements and asking for time.

On the conclusion of the evidence the case was removed for argument to Graham's Town; when (25th February, 1875), after hearing counsel, the Court granted absolution from the instance with costs. From this judgment the plaintiff appealed.

Jacobs, A.G. (with him *Cole*), for the appellant, urged that from the circumstances disclosed it was clear Thorne contemplated insolvency at the time of the payment of the note, and that there was an intention to prefer. As a matter of fact Thorne was insolvent some months before, and one creditor was actually preferred above another. The payment of the note before maturity was a most extraordinary proceeding and could not in any way be said to be in the ordinary course of business. From the newspaper report of the trial it appeared the learned Judge came to the conclusion that Thorne did not intend so much to prefer the defendant as to secure Brooks, and it was mainly on this ground that absolution had been granted.

Upington (with him *Buchanan*), for the respondent, argued that the transaction between the insolvent and defendant was entered into *bonâ fide*, and without contemplation of sequestration or intent to prefer defendant. If the payment was made with intent to prefer any one other than the defendant, the trustee had his remedy against such a person under the 85th section of the Ordinance. There was no collusion between Thorne and the defendant, or want of *bona fides* on the part of the defendant, and as he had lost his recourse on Brooks by giving up the note, the trustee would have to indemnify the defendant under the 90th section against loss. The trustee might have a good case against Brooks, but the defendant had not, and it was useless to direct the repayment of the money when defendant could immediately demand it again from the trustee. (*Ex parte Blackburn*, 12, L. R., Eq., 358; *Pocock's Trustees vs. Harris's Executors, Buch.*, 1869, p. 153.)

DE VILLIERS, C.J., in giving the judgment of the Court, said:—I am at all times loth to disturb any judgment upon a question of fact; but in this case, after a careful consideration of the whole of the evidence, I am constrained to say I

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see no alternative but to reverse the decision of the Court below. The 84th section of the Insolvent Ordinance enacts that any payment made by any insolvent to any creditor, such insolvent at the time contemplating the sequestration of his estate, and intending thereby to prefer directly or indirectly such creditor, shall be deemed to be an undue preference, and is declared to be null and void. This contemplation of sequestration and intention to prefer are questions of fact, but they must be gathered from all the surrounding circumstances. From the circumstances proved, Thorne must have known he was hopelessly insolvent and at the time of the payment must have contemplated sequestration. His object was that Friedlander should get the full amount of his claim, and so be preferred over and above the other creditors. This decision may be a hardship on Friedlander, because, as at present advised, there is no evidence of any collusion: on the contrary, the evidence goes to show he had no cognizance of the position of the insolvent's affairs. But the 86th section does not refer to any knowledge on the part of the creditor as being requisite. With regard to the argument drawn from the provisions of the 85th section, I do not think that affects the case. But under the 90th section it is clear the trustee cannot have judgment without granting the indemnity required by that section.

Appeal allowed accordingly, and judgment given for plaintiff for £567 10s. upon his giving an indemnification to defendant as required by the 90th section of Ordinance No. 6, 1863.

[Appellant's Attorneys, FAIRBRIDGE & ARDERNE.]
[Respondent's Attorney, VAN ZYL.]

PULVERMACHER vs. SEARLE.

Promissory Note.—Provisional Sentence.

Provisional sentence refused on a promissory note in the hands of a third party, where the words "or order" had been re-inserted after signature, said words having been erased before signature.

1875.
June 14.
Pulvermacher
vs. Searle.

Buchanan, at the suit of Messrs W. & B. Pulvermacher, prayed provisional sentence on a promissory note for £59 14s., made by the defendant on the 15th December, 1874, payable four months after date to H. B. Mayers or order, and by him endorsed in blank.

Jacobs, A.G., opposed, and put in affidavits stating that

the note was given merely as an acknowledgment for certain goods sold by Mayers to defendant on the condition that any of the goods not disposed of by the defendant within the four months were to be taken back by Mayers; and that to prevent the note being negotiated the words "or order" had been erased before the note was signed, which words had been re-inserted after defendant had parted with the note without his knowledge or consent. The goods had not been all disposed of.

There were no answering affidavits.

Provisional sentence refused, with costs.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.]
[Defendant's Attorneys, CHRISTIE & DU PREZ.]

1875.
June 14.
Pulvermacher
vs. Searle.

MALCOLM vs. CAMPBELL, N.O.

Civil Imprisonment.—Female Debtors.

A Resident Magistrate has no right to refuse a writ of civil imprisonment against a female debtor, on the ground that there is no suitable prison accommodation.

Jacobs, A.G., for the applicant, moved on notice upon the respondent, the Resident Magistrate of Cape Town, requiring him to show cause why he should not be ordered to entertain an application for civil imprisonment, prayed upon summons issued against one Georgina Curtis for £13 18s. 4½d., against whom judgment had been obtained, writ of execution taken out, and return of *nulla bona* made.

No notice having been given to Mrs. Curtis, the application was ordered to stand over.

Postea (June 15), notice having been served on Mrs. Curtis, and no appearance being made by her or by the Magistrate,

Jacobs, A.G., put in affidavits setting forth the facts alleged, and stating that the Magistrate had refused to grant a writ of civil imprisonment, as there was no gaol accommodation for female debtors.

The Court ordered that the Magistrate entertain the application in the ordinary way. So long as the law remained as it was, the Magistrate was bound to issue a writ against a female debtor; and if there was no suitable prison accommodation, it must be provided.

[Appellant's Attorneys, FAIRBRIDGE & ARDERNE.]

1875.
June 14.
" 15.
Malcolm vs.
Campbell, N.O.

DE JAGER vs. SCHEEPERS.

Will: construction of.—Jus accrescendi.

Husband and wife having by mutual will bequeathed certain landed property to their two sons, "in the first place for both of them, and secondly the eldest son of our grandchildren shall always have the same rights thereto;" and after the decease of both testators (the legacy having vested) one of the sons died;—HELD, that there was no jus accrescendi in favor of the surviving son, but that he was entitled to his interest in half only of the property.

1875.
June 16.
De Jager vs.
Scheepers.

Gideon Johannes Hendricus Scheepers (in his individual capacity as also in his capacity as executor dative of the estate of the late Gideon Carolus Johannes de Jager), Carolus Johannes Petrus de Jager, Petrus Jacobus Johannes de Jager, and Charles William Guest (in his capacity as sole trustee in the insolvent estate of the said Carolus Johannes Petrus de Jager), the defendants, were summoned to answer Johannes Stephanus de Jager, the plaintiff, in an action to set aside and cancel a certain transfer and a certain lease, and to declare the rights of the respective parties under a certain codicil; and also to recover damages sustained by reason of the wrongful acts of the defendants, or some of them.

The plaintiff's declaration set forth, that on or about the 22nd September, 1812, Carel Johannes de Jager and Susanna de Jager (born Scheepers), who were married together in community of property, made their joint will containing the usual reservatory clause. That by a codicil dated the 4th April, 1820, the testators appointed one H. J. van der Hoven and J. H. Bernard as executors of their estate and guardians of their minor children. That on the 19th July, 1822, the testators made a second codicil, a translation of which was to the following effect:—

"We the undersigned, testators of the above testament or last will, having taken into consideration that it would be useful and necessary for our surviving children and grandchildren to add the following to this our testament as follows: We expressly desire and hereby bequeath to our two children procreated in wedlock, namely Gideon Carolus Johannes de Jager and Johannes Stephanus de Jager, our dwelling place called Buffel's River, situate on the Oliphant's River, in the District of George, and also a certain piece of ground situate on the lower side of the dwelling place beforementioned and also adjacent thereto (now also surveyed), with this understanding, however, that our two above mentioned children shall not have the right to sell, exchange, or pledge the same, or in any other way to dispose of it, and that this above mentioned bequest of our dwelling place together with the adjoining piece of quit-rent land shall remain in the first

place for both of them, and secondly the eldest son of our grandchildren shall always have the same rights thereto, and after the decease of their parents shall remain in possession thereof, with this understanding however, that the other heirs that in future may be born shall have equal share therein and right thereto; wishing and desiring we, the testators, that it is our sole object to prevent our above mentioned bequest falling in other hands, but to be for the convenience and benefit of our two children and grandchildren, so that always the eldest son of the grandchildren has the preference, and since the place is provided with a strong flowing stream of water, and with sufficient arable soil, the grandchildren can, according to our idea, if God grants his blessing, earn their living thereon."

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That the testator died in 18—, and the testatrix in 1825, without having altered or revoked the bequest, leaving their two sons Gideon Carolus Johannes de Jager and Johannes Stephanus de Jager then surviving. That letters of administration having been duly granted to the executors, they, in or about the year 1831, transferred the farm to the aforesaid two sons. That the said Gideon Carolus Johannes de Jager died on the 10th January, 1860, leaving two sons, the defendants, Carolus Johannes Petrus de Jager and Petrus Jacobus Johannes de Jager, him surviving. That the defendant Scheepers was duly appointed executor dative of the estate of the said Gideon Carolus Johannes de Jager, and in such capacity, on the 17th October, 1872, transferred the one half share of the farm which had belonged to the said Gideon Carolus Johannes de Jager to his son, the said Carolus Johannes Petrus de Jager. That in April, 1861, the estate of the said son was placed under sequestration, and defendant Guest appointed sole trustee. That the said Carolus Johannes Petrus de Jager and Petrus Jacobus Johannes de Jager, by themselves or their agents, had, ever since the death of their father, been in possession and occupation of the said half share of the farm. That on the 3rd January, 1873, the said Carolus Johannes Petrus de Jager executed a lease, by which he professed to let for ten years, reckoned from the 1st May, 1873, unto the defendants Scheepers and Petrus Jacobus Johannes de Jager, his supposed share of the said farm. And the plaintiff submitted, that according to the true and proper construction of the before recited codicil, he became entitled, upon the death of his brother Gideon Carolus Johannes de Jager, to the whole of the farm Buffels River and adjacent land for the term of his natural life, and that after his death the same must pass to then eldest living grandson of the testators. Wherefore the plaintiff prayed the Court to declare the transfer to Carolus Johannes Petrus de Jager and the lease by him null and void, and to order the same to be cancelled; and to declare the plaintiff entitled to the usufruct of the whole farm for his life, with remainder over to the eldest then living

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grandchild ; and that the defendants Carolus Johannes Petrus de Jager, Petrus Jacobus Johannes de Jager and Scheepers be ordered forthwith to give up to him possession of the farm and be restrained by perpetual interdict from again trespassing thereon ; and that the defendants (Guest excepted) be condemned to pay £500 damages sustained by reason of their trespass and occupation of the farm, and as for the rents and profits thereof ; and lastly, for further and other relief, with costs of suit.

The defendant Guest appeared and submitted to the judgment of the Court, and prayed his costs.

The defendants Scheepers and Petrus Jacobus Johannes de Jager admitted the will of the 22nd September, 1812, and the codicil of 4th April, 1820 ; the death of the testators without having revoked the said will and codicil, and a certain other codicil of the 19th July, 1822 ; the appointments of the executors ; and then pleaded a general denial of all the other allegations of fact and conclusions of law in the declaration contained. They then specially pleaded the codicil of the 19th July, 1822, of which they alleged the following to be a translation :—

“ We the undersigned testators of this our testament or last will aforewritten, having taken into consideration that it would be useful and necessary for our children and grandchildren who shall survive us, to add the subjoined to this our will as follows : We desire expressly and bequeath hereby to our two children procreated in this marriage, named Gideon Carolus Johannes de Jager, and Johannes Stephanus de Jager, our residence named Buffels River, situated on the Oliphants River, in the district of George, together with a certain piece of ground lying on the lower side of the aforesaid place of residence, and also adjoining thereto, at present also surveyed. With this proviso, however, that our two aforesaid children may not sell, exchange, or hypothecate the same, or in any way relating thereto, and that this beforementioned bequest of our place of residence, together with the piece of perpetual quit-rent land thereto adjoined, shall remain in the first place for both of them, and in the second place the eldest son of our grandchildren shall always retain the same right thereto and after the death of their parents remain in possession thereof. With this proviso, however, that the remaining heirs who shall survive, shall enjoy an equal share and right therein. We the testators wishing and desiring this only to be our object, not to allow the aforesaid bequest to fall into strange hands, but to be for the convenience and benefit of our two children and grandchildren, so that the eldest son of the grandchildren may always have the preference. And whereas the place is provided with a large stream of running water, and sufficient serviceable ground, the grandchildren can, according to our opinion, if God gives his blessing, derive sufficient therefrom.”

That on the 20th December, 1831, the executors transferred the property to the said two sons of the testator and testatrix, subject to the instructions and conditions contained in the said codicil. That subsequently to the death of

the testator and testatrix, it was agreed by and between the plaintiff and the said Gideon Carolus Johannes de Jager that the farm should be divided and that the plaintiff should occupy and be owner of the land falling on the west side, and Gideon Carolus Johannes de Jager should occupy and be the owner of the land on the east side. That Gideon Carolus Johannes de Jager died on the 10th January, 1860, leaving two sons, the said defendants Carolus Johannes Petrus de Jager and Petrus Jacobus Johannes de Jager, him surviving, and defendant Scheepers was appointed executor dative of the estate of the said late Gideon Carolus Johannes de Jager, and on the 17th October, 1872, transferred the one half share belonging to him to his eldest son, the said Carolus Johannes Petrus de Jager, subject to the conditions mentioned in the aforesaid codicil. And the defendant submitted, that according to the true and proper construction of the said codicil, and in the events which had happened, that on the death of the said Gideon Carolus Johannes de Jager the plaintiff did not become entitled to the usufruct of the whole of the farm, but that the defendant, Carolus Johannes Petrus de Jager, became thereupon entitled to the portion occupied and owned by his late father. That on the 3rd January, 1873, Carolus Johannes Petrus de Jager made and executed a lease for ten years, to be reckoned from the 1st May, 1873, with the two defendants, Scheepers and Petrus Jacobus Johannes de Jager, of his share of the said farm, copy of which lease was annexed; wherefore the defendants prayed that the plaintiff's claim should be dismissed with costs.

Plaintiff's replication was general.

The defendant Carolus Johannes Petrus de Jager made default.

The original codicil of the 19th July, 1822, referred to in the pleadings was in the following terms:—

“Wij ondergeteekende testateuren van dit voorschreven onze testament of te laatste wille in overweging genomen hebbende, dat het voor onze natelatene kinderen en kindskinderen zoude nuttig en noodig zijn om dit hier onder staande bij dit ons testament nog bij te voegen, zoo als volge: Wij begeeren wel expresselijk en vermaken bij dezen aan onze twee in het huwelijk verwekte kinderen, met namen Gideon Carolus Johannes de Jager en Johannes Stephanus de Jager, onze woonplaats genaamd de Buffels rivier, gelegen aan de Olifantsrivier, onder het district van George, beneffens een zeker stuk grond liggende aan de onderzijde van voornoemde woonplaats, en ook daaraan-grenzende (thans ook opgemeten). Nogthans met dien verstande, dat onze twee hiervoren genoemde kinderen niet vermogen dezelve te verkoopen, te verruylen, of verpanden, of te eenigzints dien aangaande, en dat altijd deze hiervoren genoemde vermaking van onze woonplaats, beneffens het daaraan zijnde stuk erfpacht grond, zal blijven, ten eersten voor hun beiden, ten tweede zal altijd de oudste zoon van onze kindskinderen dezelve regt daarop hebben, en na het overlijden van hunne

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ouders daarvan in bezit blijven. Nogthans met dien verstande, dat de overige nog voortspruitende erfgenamen zullen gelijk aandeel en regt daarvan genieten; verkiezen en begeeren wy testateurs dit alleen ons oogmerk te zijn om voornoemde vermaking niet in andere handen te doen vervallen, maar tot gerief en voordeel voor onze twee kinderen en kindskinderen te zijn, zoo dat altijd de oudste zoon van de kindskinderen het voorregt heeft, en de dewijl de plaats van een sterke en loopende water met genoegzaam bruikbaar grond voorzien is, zoo kunnen de kindskinderen volgens onze gedachten, als God zijn zegen geeft, daarop haar uitkomste hebben.”

At the hearing the facts of the case were admitted.

Jacobs, A.G. (with him *Cole*), for the plaintiff, submitted that according to the true construction of the codicil the plaintiff, as the surviving son of the testator and testatrix, was entitled by the *jus accrescendi* to a life interest in the whole of the property bequeathed. (*Van der Linden*, p. 133.) The property in the first instance would pass to the sons for their joint lives, then to the survivor of them, and after the decease of both the sons it would go over to the then eldest grandson.

Upington (with him *Jones*), for the defendants, denied there was any such right of survivorship at common law as was contended for on behalf of the plaintiff; and that to support such a claim there must be express explicit words in the codicil. The intention of the testators was directly contrary to such a construction. They referred to *Grot.*, 2, 23, 4, and 5, *Schorer's note*; *J. Voet, Comp.*, 30, 20; *Voet*, 30, 31, 32, n. 63; *Roper and White on Legacies*, 4th ed., p. 1,360.

Jacobs, A.G., in reply cited *Mackenzie's Roman Law*, p. 249.

DE VILLIERS, C.J., said:—There can be no doubt this codicil is rather ambiguous, but it must be read as a whole and reasonably construed. The testators begin by saying that they made this codicil believing it would be useful and necessary for their surviving children and grandchildren; and then they proceed to bequeath the property to their two sons on condition *inter alia* that the bequest shall remain “in the first place for both of them.” The codicil goes on to say, “secondly, the eldest son of our grandchildren shall always have the same rights thereto, and after the decease of their parents shall remain in possession thereof, with this understanding, however, that the other heirs that in future may be born shall have equal rights thereto.” These words involve a grammatical error and show some confusion in the minds of the testators, but I think they clearly intended that upon their death their two sons should each have a half of the property, which half should go after their death to their respective eldest sons. The words used

in the original leave no doubt in my mind that this was their intention. The words "the other heirs that may in future be born" merely have reference to the possibility of future children being born to the testators; but I fail to see how such children if they should be born could have "equal rights" if the construction contended for on behalf of the plaintiffs be the right one. It follows that the eldest son of Gideon de Jager was entitled to this half of the property, and it was properly transferred to him, and that the lease could be made by him. One point has been raised in the argument, and that is whether the lease could legally have been made by Carolus de Jager at that time, but that question is not before the Court upon the pleadings. The plaintiff has relied simply on the codicil, and therefore it is unnecessary to express any opinion as to the validity of the lease. There must be judgment for the defendants.

DENYSSEN, J., said:—It must be distinctly understood that the question of the validity of the lease is not now before us. The only question for decision is the claim of the plaintiff under the codicil to the whole of the property. It is a common practice among people of the class like the de Jagers to leave their property to all their sons; but it is not customary or usual in this colony to bequeath the landed property to one child. Not only is the construction come to by the Court in accordance with the ordinary practice, but it is also a reasonable construction to put on the codicil.

FITZPATRICK, J., concurred.

Jacobs, A.G., addressed the Court on the question of costs. If there had been an open estate costs would have been ordered to come out of that estate. The action had been brought to obtain a decision on a document for the ambiguity of which neither party was responsible.

Upington said the defendants had acted in accordance with what was decided to be the intention of the testators. The plaintiff had allowed a long time to elapse before bringing his action.

DE VILLIERS, C.J.:—If the plaintiff had raised the objection at the time the transfer to defendant was passed, the costs might have been ordered to come out of the estate; but the estate was now wound up. There was no reason for departing from the usual rule, that the unsuccessful party must pay the costs.

Judgment accordingly for defendants, with costs.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.
Defendant's Attorneys, CHRISTIE & DU PREEZ.
Attorney for Guest, TIRAN.]

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June 16.
De Jager vs.
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SUPREME COURT REPORTS.

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PART III.

FLETCHER & CO. *vs.* MCLAGLIN.

Interest.—Tempus Moræ.

Whether interest on an account acknowledged correct accrues from the date of stating the account, or of summons.

Provisional sentence was prayed for £131 10s. 10d., being the balance of an account signed by the defendant as "examined and found correct, Cape Town, September 19th, 1874;" together with interest.

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July 12.
Fletcher & Co.
vs. McLaglin.

Defendant was in default.

Upington, for the plaintiff, claimed interest from the date of stating the account; but after reference to *Van der Linden*, p. 218, and *Voet* 22, 1, 11, and there being no proof of a previous demand, agreed to take judgment for interest to be reckoned from the date of service of the summons.

Provisional sentence was given accordingly. Leave was reserved to plaintiffs to apply for further interest should they be in a position to do so.

[Plaintiffs' Attorneys, FAIRBRIDGE & ARDERNE.]

ATTWELL & CO., *vs.* VAN DE VEN AND THE EDITOR
OF "THE STANDARD AND MAIL."

Inspection of alleged libellous letter.

Application to compel the delivery of a copy of a letter alleged to have been written and sent to a newspaper, but not published, refused.

This was an application upon notice calling upon the respondents to show cause why they or either of them

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and another.

should not be ordered to hand over to applicants' attorneys, a true and correct copy of a certain original letter addressed by the respondent Van de Ven to the Editor of the *Standard and Mail* newspaper, dated on or about the 22nd June instant, on the subject of the flour used by the applicants in their baking business in Cape Town.

Cole appeared for the first named respondent. There was no appearance for the "Editor" of the newspaper, who was not mentioned by name.

The affidavit of J. B. Buissinne, one of the applicants' attorneys, set forth that the applicants were about to institute an action against the first named respondent for damages, as alleged in the letter of demand annexed; that deponent had applied to the Editor of the paper called the *Standard and Mail*, and also to the attorneys for respondent Van de Ven, for the copy of the letter written by Van de Ven to the Editor of the said paper mentioned in the letter of demand, explaining to them that the letter was required to enable deponent to issue a summons against Van de Ven at the suit of the applicants for damages sustained by reason of the allegations contained in the said letter; that Van de Ven's attorney refused to furnish a copy of the letter unless compelled to do so by order of Court; that it was within the power of Van de Ven to furnish a copy of the letter, and his only reason for refusing to do so deponent believed was to prevent applicants from instituting their action.

The letter of demand alluded to, from applicants' attorneys to respondent Van de Ven, was as follows:—

"SIR,—We are instructed by Messrs. Attwell and Co., of Cape Town, bread and biscuit bakers, &c., to demand from you an amende honorable and profitable. Honorable by an apology in writing, and profitable by the payment to them of £500 sterling, as and for damages sustained by them by reason of your having in Cape Town, on or about the 22nd day of June, 1875, made use of the following false, slanderous, and defamatory expressions of and concerning the said Attwell and Co., in a letter or communication handed by you to the Editor of the *Standard and Mail* for the purpose of having the same published in that paper, to wit:—'They (meaning the said Attwell and Co.) bake bread with damaged flour and sell it,' or words to that effect and meaning, and which said letter or communication, though not yet printed and published, was exhibited and read by certain persons in Cape Town to the damage and injury of our clients. Unless this demand is complied with by Friday at noon, our instructions are to institute proceedings against you."

To which respondent Van de Ven's attorneys sent the following reply:—

"GENTLEMEN,—We are instructed by Mr. W. J. van de Ven to acknowledge receipt of your letter on behalf of Messrs. Attwell & Co., and in reply to state that he denies ever having libelled or intended to libel Messrs. Attwell & Co."

Jacobs, A.-G., for the applicants, contended that they were entitled to a copy of the letter written by the respondent Van de Ven. Respondent had written a libel on applicants, and it was necessary, to enable them to bring their action, to have the exact words used. This was not in the nature of a fishing application. The principle was established that a defendant, who it had been shown had uttered imputations against another, could be compelled to answer interrogatories as to what were the exact words used by him; and if such a defendant could be compelled to answer interrogatories he could be compelled to produce a document. (*Atkinson vs. Fosbrooke*, 1 L.R., Q.B., 628; *Davey vs. Pemberton*, 11, C. B., n.s., 628; *Rainy vs. Bravo*, 4, L.R., P.C., 287; *Storey's Eq. Juris.*, § 1483.)

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Cole, for respondent Van de Ven, urged that no ground had been shown for the application. There was no evidence of any publication or allegation that any one had seen the alleged letter. Respondent denied ever having libelled the applicants. Even if there was such a letter, as libel was a criminal offence in this Colony, the respondent could not be compelled to produce a document which would subject him to a criminal prosecution. (*Tupling vs. Ward*, 7, Jur., n.s., 314; *Taylor on Ev.*, § 1605; *Hill vs. Campbell*, 10, L.R., C.P., 222.)

Jacobs, A.-G., in reply, said that an order for the inspection of the letter ought in the first place to be granted, and it was for the respondent then to set up that its production would tend to criminate him.

DE VILLIERS, C.J.:—It is unnecessary in this case to decide the point raised, as to respondent's right to refuse to produce the document on the ground it might tend to criminate him. I have no doubt that the Court would have the power to order an inspection of a document when it was clearly proved that there had been a libel, and the only question was as to the terms of the libel. But it must be clearly proved there had been a libel. It was not sufficient evidence to give hearsay statements. There should be witnesses in whose presence the libel had been read or who had seen the document. There was no satisfactory evidence before the Court now that any libel had been uttered. An attorney merely wrote a letter charging respondent with having libelled the applicants, and the respondent replied denying having done so.

Application refused with costs.

[Applicants' Attorneys, BUISSINNE.
Respondents' Attorneys, BERRANGE & DE VILLIERS.]

JONES vs. BORRADAILE, THOMPSON, HALL & Co.

Order to inspect.

Plaintiff allowed access to certain goods sold and delivered by plaintiff to defendants, for the purpose of ascertaining the quantity delivered.

1875.
July 12.

Jones vs.
Borradaile,
Thompson, Hall
& Co.

The case of *Jones vs. Borradaile, Thompson, Hall & Co.*, in which the plaintiff sued for the price of certain shooks or cask staves sold (for statement of pleadings, &c., *vide ante*, p. 40) was tried on the 1st and 2nd June last, when judgment was given for the amount tendered by defendants, and absolution from the instance with costs as to the balance of the plaintiff's claim, the plaintiff being unable to prove the actual quantity of shooks delivered. After some correspondence between the parties, notice was served on the defendants that the Court would be moved for an order to compel them to allow the plaintiff to have access to defendants' premises, to enable the plaintiff to gauge the tonnage of the casks sold in shooks and purchased by the defendants from plaintiff at the public sale on the 4th September, 1874, and conveyed by the defendants to their store and there deposited, so as to ascertain the number of gallons held by the said casks, as sold and to be paid for, and for that purpose to allow the plaintiff to set up the casks on the defendants' premises; or otherwise, in case they should object to such access for such purpose and to the casks being so gauged on their premises, that they allow the casks to be removed to some cooper's yard or other suitable place by the plaintiff there to be gauged in the presence of defendants or their servants, or on such other conditions as the Court should direct.

Cole, for the plaintiff, supported the application by Mr. Jones' affidavit, in which it was stated that the only way open to plaintiff of ascertaining the contents of the casks, and consequent price of the shooks, was to have every cask "set-up" separately and gauged by a competent person.

Jacobs, A.-G. (with him *Upington*), for the defendants, read answering affidavits, and urged that the plaintiff had other means of ascertaining the contents of the casks, and if he had not he was not now entitled to annoy the defendants and cause inconvenience to their business for the purpose of relieving himself against his own neglect.

The affidavits referred to several matters raised during the late trial, and also stated the fact that certain heads and other portions of casks sold still remained in the plaintiff's possession.

The Court ordered that the plaintiff be at liberty to set up the casks on defendants' premises, using for that purpose only the shooks and heads found on defendants' premises.

1875.
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—
Jones vs.
Borradalle,
Thompson, Hall,
& Co.

Application granted accordingly, with costs.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.]
[Defendants' Attorney, TREDGOLD.]

STEYN vs. BEUKES.

Principal Case.

Where provisional judgment had been obtained by default, and writ of execution issued and satisfied, plaintiff ordered, on defendant's entering appearance to defend, to go into the principal case.

On the 28th May 1874, the plaintiff obtained provisional sentence by default for the principal and interest due on a promissory note for £67 10s., signed by the defendant in favour of and endorsed by one J. J. P. Le Grange. A writ of execution was issued, and on the 6th January 1865, a cart and pair of horses in defendant's possession were attached, which cart and horses were subsequently released on payment to the Sheriff of £100, which amount was afterwards accounted for to the plaintiff. On the 28th January defendant entered appearance to defend, and instructed his attorneys to give notice thereof and demand the filing of plaintiff's declaration. No further action was taken, and defendant now upon notice called upon the plaintiff to show cause why he should not be debarred from pleading, and leave granted to defendant to sign judgment against the plaintiff for non-prosecution of his action.

1875.
July 12.
—
Steyn vs.
Beukes.

Cole, for the defendant, put in affidavits stating the above facts, and further that the case had been previously before the Court (*vide Buch. Reports*, 1874, p. 22), when absolution from the instance was given; and that defendant had no notice of fresh proceedings until the seizure of the cart and horses, the summons having been left at a farm where defendant had temporarily sojourned but which he had left before action.

Buchanan, for the plaintiff, read an answering affidavit, and contended that plaintiff's judgment having been satisfied and no security *de restituendo* taken, the suit in which

1875.
July 12.
Steyn vs.
Beukes.

provisional sentence had been obtained was ended; and that it was now for the defendant to institute what proceedings he thought fit, and not for the plaintiff to continue his action.

The Court ordered the plaintiff to go into the principal case, and go to trial during the next term; costs to be costs in the cause.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.
Defendant's Attorneys, CHRISTIE & DU PREEZ.]

QUEEN vs. K.

Incest.

Carnal intercourse between persons related by affinity within the forbidden degrees is punishable as incest.

1875.
July 15.
Queen vs. K.

A bill of indictment was preferred against the prisoner for the crime of incest, committed by his having had carnal connection with his wife's sister.

DE VILLIERS, C.J., in charging the Grand Jury on the bill said:—The popular idea of incest is carnal connection between persons too nearly related by blood. There are certain authorities which would seem to confine it to that, but the weight of authority goes to show that no distinction in law is to be made between relationship by blood and relationship by marriage. At this stage of the case, I may tell you that if you believe there is *prima facie* evidence that the prisoner had carnal connection with this girl, you will be justified in finding a true bill, leaving the law to be afterwards argued. I can only charge you now, that the weight of authority is in favour of holding that carnal connection between persons related by marriage within the forbidden degrees is incest, and punishable as such.

[The Grand Jury found a true bill against the prisoner, but at the trial at bar he was acquitted. The following authorities were collated for use at the trial:—*Van der Linden*, 2, 7, 7*; *Censura Forensis*, 5, 28, 1; *Van Leeuwen's Com.*, 4, 37, 9; 1, 14, 13; *Voet*, 48, 5, 19; *Matt. de Crim.*, 48, 3, 6, 2; 48, 3, 7, 25; *Erskine's Inst.*, 4, 4, 56; *Alison's Crim. Law of Scotland*, c. 29; *Leyser. Med. ad Pand.*, 586, 6; *Perezus*, 5, 5, 2.]

* In *Henry's* translation, p. 359, it is stated that the crime consists of the connection of persons, "whose marriages with each other are forbidden by law, on account of *consanguinity*." The translation should have been "relationship," not "*consanguinity*."

CUNNINGHAM *vs.* CUNNINGHAM.

Marriage : declaration of nullity of.—Bigamy.—Edictal citation.

The extra-judicial admission of the defendant received in proof of the fact that he had entered into a bigamous marriage with the plaintiff.

The plaintiff and defendant were married at Cape Town on the 16th June 1868, and on the 7th of the next month the defendant (the husband) left the Colony for England, and had never returned. Since his departure the plaintiff ascertained that at the time of the above marriage defendant was a married man, and that his wife, one Catherine de Lacy, was then living in Liverpool. The plaintiff set forth the above facts in a petition to the Court, and obtained leave to sue by edictal citation in an action to have the marriage between them set aside and declared null and void; the citation returnable the 1st June 1875, to be served at the last known place of residence of the defendant, at the residence of the alleged lawful wife, and at the residence of defendant's mother, and to be once published in the *Government Gazette*.

On the return day of the edict, defendant being in default, due service was proved, and the case set down for hearing on the last day of term.

1875.
February 12.
June 1.
" 16.
August 5.
Cunningham
vs
Cunningham.

At the trial (June 16), the defendant being still in default,—

Cole, for the plaintiff, proved the marriage of the plaintiff and defendant, the fact of defendant's departure and continued absence from the Colony, and that in his declaration before the Magistrate as required by law before his marriage with plaintiff, the defendant had deposed:—"I do solemnly and sincerely declare that I am a widower and without issue, and that my wife, Catherine Cunningham, born de Lacy, died at Liverpool on the 13th January 1864." In support of the allegation that Miss de Lacy was living at the time of the second marriage, a letter from defendant to plaintiff, dated 12th November 1868, was proved, containing the following admissions:—"I have been afraid to write to you before this, and indeed even now I do not know what to say to you. When I got to London I went for letters but none for me from you, but this was from my mother enclosing your letter to her. I at once set to prove Katie's death, but it is not so for she is alive and well, but had gone away without letting even her mother or sister know where to; but it took me three weeks to know if she was alive or not. Mr. ——— told a lie to shield himself from me, but I have written to him and so has his father, so that I can prove that when I married you, dear

1875.
February 27.
June 1.
" 16.
August 5.
Cunningham
vs.
Cunningham.

Sara, it was under the full belief of her death. Sara, indeed I am punished for this, for my own people have thrown me off altogether. You of course now can do nothing but hate me, and Kate will not even (now that I have told her all) speak to me, so that there is nothing for me to do but to leave this country for ever. My goodness! I have two wives, and I have not either of them. Sara, you will I hope believe me when I say that I did not do this crime towards you knowingly, for God only knows that I was too fond of you to willingly do you harm. Sara, for God's sake I ask you to forgive me for what I have done to you, for it was not knowingly, it was done believing in my wife's death. * * *

The further hearing of the trial was then adjourned to enable the plaintiff to produce additional evidence to prove that defendant's first wife was alive at the date of the second marriage, or to apply for a commission *de bene esse* to examine witnesses in England if so advised.

This day (August 5th),—

Cole, for the plaintiff, urged that the admissions contained in defendant's letter set forth above, were sufficient to prove the fact that the second marriage was bigamous. In *Wylde vs. Wylde*, 1, *Menz.*, 269, it was laid down that the admission of the defendant was not sufficient proof *per se*, but that the case was a peculiar one and distinguishable from the present suit. In *Wylde vs. Wylde* the confession of adultery was made on the record for the express purposes of the suit. All the authorities drew a distinction between that sort of confession and confessions made extra-judicially. The rule which prohibited a decree from passing on the party's admission on the record should not prevent the Court from receiving extra-judicial admissions. Such confessions "when perfectly free from all taint of collusion and when confirmed by circumstances and conduct rank amongst the highest species of evidence." (*Dickson's Law of Evidence in Scotland*, § 1446; *Harris vs. Harris*, 2, *Hagg. Eccles. Rep.*, 409.) In this case the letter was written seven or eight years ago before legal proceedings were thought of, and there was no reason to suppose there was any collusion. The object of the plaintiff in getting a decree was to enable her to deal with her own landed property, which otherwise she could not dispose of. The admission of adultery by the wife has been held sufficient proof upon which to grant divorce. (*Robinson vs. Robinson*, 5, *Jurist n.s.*, 392; *Williams vs. Williams and Padfield*, 35, *L.J., Mat. Cas.*, 8.)

The Court granted a decree of nullity of the marriage as prayed.

[Plaintiff's Attorney, BUISSINNE.]

BARLING vs. THE TOWN COUNCIL OF CAPE TOWN.

Act No. 1, 1861.—Act No. 1, 1867.—*Municipal Regulations.—Dog Tax.*

A Municipal Regulation imposing a tax of a reasonable amount on dogs kept within the Municipality, is a Regulation of general utility intra vires the Town Council of Cape Town.

The applicant on petition, of which notice had been given, showed to the Court that he was, on the 12th July, 1875, summoned to appear before the Resident Magistrate for Cape Town, upon the complaint and information of the Town Council, to answer the charge of having contravened section 196, of the Municipal Regulations, by keeping a dog in Cape Town without having the same registered at the Town House on the 1st July 1875, and was adjudged by the Magistrate to pay a fine of one pound sterling for such offence, which fine was then and there paid. That at the hearing of the case applicant stated that he had taken out a register for his dog on the 2nd July, and urged that it was a reasonable time after the day on which it should have been taken out, and also that the register was for the year 1875; but that the Magistrate refused to note these objections, and took a plea of not guilty, and after hearing the evidence inflicted the fine as aforesaid. That applicant felt aggrieved by the judgment of the Magistrate, not only for the reasons above-mentioned, but also on the ground that the Town Council had not the right to impose or levy a tax upon dogs, and that both the said section 191, and the judgment of the Magistrate thereon, were illegal.

A preliminary objection was taken to the form in which the case had been brought before the Court, but by consent it was decided to confine the issue to the right of the Town Council to pass a Municipal Regulation of the nature of the one in question.

The 191st section of the Municipal Regulations was in the following terms:—"The owner of all dogs kept within the limits of the municipality shall annually apply for and obtain from the Secretary to the Town Council a register and number on a brass plate for every such dog, and shall pay the sum of five shillings for every register and number as aforesaid; and any dog found in any street without a collar, either of metal or leather, with the registered metal plate fastened thereto, shall be destroyed by the police:

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" 10.
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provided always, that no dog accompanying any person in charge of any wagon from the country, or being with, or in charge of any person from the country, shall be liable to be destroyed because of the want of the collar aforesaid: and any person contravening this regulation shall be liable, on conviction, to a penalty not exceeding £5, and in default of payment to a term of imprisonment not exceeding three calendar months."

Upington, for the applicant, contended that the Town Council had no power to impose a dog tax. Under sections 15 and 16, of Act No. 1, 1861, the Municipal Commissioners had power given them to frame regulations, and amongst others to frame regulations to fix a tariff of fees for certain licences, and also to abate nuisances. The 191st Regulation had been framed and approved by the Governor as required by section 14, of Act No. 1, 1867. Three questions presented themselves in considering the action of the Council: first, whether the keeping of a dog was *primâ facie* a nuisance; secondly, if so was the regulation an attempt to abate the nuisance; and thirdly, whether the Council under any circumstances had the power to impose any charge or impose any tax for the keeping the dogs. There was no authority to the effect that the keeping of a dog was a nuisance, and even if it was a nuisance a regulation for granting a licence was not one framed for the purpose of abating it. By the Act the Town Council had the power to impose certain taxes which were specified, but there was no mention of a dog tax.

Jacobs, A.-G., for the Town Council, said a large number of municipalities throughout the Colony had adopted similar regulations imposing a dog tax. It was true these regulations were framed under the general Municipal Ordinance, but there was no dissimilarity in principle between that Ordinance and the Town Council Acts. The 191st Regulation did not impose a tax, but only required every owner of a dog to take out a register and brass plate, for which the Town Council charged a certain sum, and the Court would not now consider whether that charge was or was not too high. The power of the Town Council to frame regulations was not so limited as was contended for by the applicant. It was sufficient if the regulation was not repugnant to or inconsistent with the true intent and meaning of the Act. By the Act No. 1, 1861, the Council had power to frame regulations for any purpose of general utility, and the regulation in question came within the true meaning of the Act. *The Municipality of Graham's Town vs. Ford and Jeffrey*, 3, *Buch. Menz.* 506;

Blackwood vs. London Chartered Bank, 5, L.R., P.C.C. 108.)

Cur. ad. vult.

Postea (August 10),—

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DE VILLIERS, C.J., in giving judgment, said:—The only question to be decided in this case is whether the 191st Municipal Regulation of the Town Council of Cape Town is *ultra vires* or not. Under Act No. 1, of 1867, read in connection with the 15th section of Act No. 1, of 1861, the Town Council is empowered to frame such regulations as it might deem expedient for certain specified purposes, such as the prevention and abatement of public nuisances, and "for all and every other purpose of general utility within the said Municipality which shall appear to require such regulations." Under the 16th section of Act 1, of 1861, such regulations, after having being sanctioned by the Governor in Council and duly published, become as legal, valid and effectual as if they had been inserted in the Act itself, subject, however, to the important proviso that nothing contained in any such regulation shall be repugnant to or inconsistent with the true intent and meaning of the provisions of the Act. By the 77th section it is enacted that all offences committed in contravention of the Act or of any Municipal regulation may lawfully be prosecuted in the Court of the Resident Magistrate for Cape Town; and that if any person shall be duly convicted of any such offence, and shall not pay or satisfy the amount of fine imposed upon him, he may be sentenced to imprisonment for a period not exceeding three months; and by the 93rd section it is provided that the several existing regulations of the Municipality, in so far as the same are not repugnant to or inconsistent with the true intent and meaning of the Act, shall remain as legal, valid and effectual as if the same had been inserted in the Act, until they shall be altered in due form of law. A provision similar to the last was introduced into Act 1, of 1867. One of the regulations subsisting at the time when the one in question was framed, provided that all dogs found in the streets between sunset and sunrise and not accompanying any person should be destroyed; and that any dog found in any street in the day time without a collar having the name of the owner thereon should likewise be destroyed. For this regulation the one now under consideration, viz., the 191st section, was substituted. It provides that the owners of all dogs kept within the limits of the Cape Town Municipality shall annually apply for and obtain from the Secretary to the Town Council a register and number on

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a brass plate for every such dog, and shall pay the sum of five shillings for every register and number as aforesaid; and any dog found in any street without a collar, either of metal or leather, with the registered metal plate fastened thereto, shall be destroyed by the police, and that any person contravening this regulation shall be liable, upon conviction, to a penalty not exceeding £5, and in default of payment to a term of imprisonment not exceeding three months. It was urged on behalf of the Town Council that this regulation does no more than compel the owner of every dog to register it, and to make it wear a collar purchased from the Council, but by no ingenuity of construction can this regulation be stripped of one of its essential features, viz., that of imposing a duty upon all dogs kept within the Municipality. On behalf of the appellant it was argued that unless it can be shown that the mere keeping of a dog is a nuisance, the Council had no power to make this regulation. It is a sufficient answer to this objection that the purposes for which the Council may make regulations are not confined to the abatement of nuisances, but extend to every other purpose of general utility within the Municipality. There appears to me to be more force in the argument of the appellant's Counsel, that inasmuch as certain specific modes of obtaining revenue by means of rates upon immovable property are pointed out by the Act, no other mode can be established by any regulation, on the principle of the maxim *expressio unius est exclusio alterius*; and if this question had been *res integra*, I should have entertained grave doubts as to whether this objection ought not to be held fatal to the validity of the regulation. But, after carefully considering the case of *The Municipality of Graham's Town vs. Ford and Jeffreys* (3, *Buch. Menzies*, 506), I am unable to distinguish it from the present. In that case, decided in 1844, it was held by the full Court, consisting of Chief Justice WYLDE and Justices MENZIES and MUSGRAVE, that under Ordinance No. 9, of 1836, a Municipality could legally frame a regulation whereby certain percentage and fees were made payable in respect to all colonial produce sold or bartered within the Municipality of Graham's Town, but not sold in public market, and in default a fine of £10. Now it is quite true that the terms in which the Town Council is empowered to frame regulations are not precisely similar to those by which like powers are conferred on Municipalities in general, but a careful perusal of both will show that the difference is very slight, and for the purpose of the decision in the present case, unimportant. The Judges held that to raise a revenue

on property, real or personal, situated within the Municipality, for the purpose of defraying the expenditure for municipal purposes of a local nature, and for the benefit of the inhabitants of the Municipality, was within the purpose and intent of the Ordinance, and that those provisions of the Ordinance which authorized the assessment of rates on immovable property had not the effect of restricting the Municipality to that kind of assessment for raising the revenue, but it is only directory that this assessment shall be made in a certain way and for a certain time. Considering that the Judges who concurred in that decision were three of the most learned and eminent men that have occupied a seat on this bench, considering that the decision has been acquiesced in for upwards of thirty years, and above all, considering that the Legislature, to whom that decision must be presumed to have been known, did not insert any provision neutralising its effect into the Act No. 1, of 1861, or Act No. 1, of 1867, it would ill become this Court at the present time, however grave the doubts it might entertain, to overrule that case. In other respects the present case does not present much difficulty. The mere fact that the Act No. 1, of 1861, contains no provision expressly authorizing the respondents to make the particular regulation now in question, does not necessarily imply that such regulation is repugnant to or inconsistent with the provisions of the Act. To invalidate the regulation, the appellant must show that it is clearly inconsistent with some provision of the Act, either express or implied. The express provision of the Act is that every regulation shall be for some purpose of general utility within the Municipality, and that the implied provision is that such regulation shall be reasonable. Now, although it is quite true that the mere keeping of one or more dogs does not *per se* constitute a nuisance, it is also clear that the keeping of an unlimited number of dogs by the inhabitants, and the prowling about of numerous ownerless dogs, might, unless prevented by timely municipal legislation, become a positive nuisance. Any regulation, therefore, which, like the present, distinctly tends to check the number of dogs so kept, and to prevent the prowling about of dogs having no owner, must be deemed to be a regulation framed for a purpose of general utility within the Municipality. And its utility becomes still more apparent when it is borne in mind that the regulation provides an important item of revenue towards defraying the municipal expenditure. But it is quite possible to conceive a regulation which is exceedingly useful but is by no means reasonable, and it therefore becomes necessary to consider whether the one

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in question satisfies the last-mentioned requirement. Now if it had gone so far as to prevent the keeping of any dog whatever within the Municipality, its inexpediency would have been such as to shock the common sense of every reasonable person, and possibly to prevent this Court from deciding in favour of its validity. But instead of that it imposes a duty of so moderate an amount that its effect can only be to keep down the number of dogs to a reasonable limit, without at the same time making the keeping of one or more dogs prohibitory. It is not an unimportant consideration in this case that the 6th Regulation, which received Legislative sanction under the Acts of 1861 and of 1867, and for which the present was substituted, expressly authorised the destruction of all dogs found in the streets at night and not accompanying any person, or in the daytime without a collar having the name of the owner engraved thereon. Moreover the fact ever since the passing of the general Municipal Ordinance in 1836, the greater number of other Municipalities have deemed it necessary and expedient, for the proper regulation of municipal affairs, to frame regulations imposing a duty on dogs, goes far to prove, not the legality (for this cannot depend upon the acts or conduct of other Municipalities), but the expediency and reasonableness of a similar regulation in the case of the Town Council of Cape Town. Under all the circumstances of the case, I am forced to the conclusion that the 191st Regulation is *intra vires* of the Town Council, and that the conviction must be affirmed.

DENYSSEN, J., said :—I am of the same opinion. It would be hardly necessary again to go over the case, except that under the circumstances it is desirable there should be no appearance of doubt in respect to the decision of the Court. It will appear from the provisions of Ordinance No. 9, of 1836, which is the first enactment relating to Municipalities, and which is known as the general Municipal Ordinance, that provision was made by the 6th section for a committee to be chosen by the householders "to frame such municipal regulations as they may deem expedient," and to submit the same when prepared to a meeting of resident householders. The wording of this section appears to have been adopted and extended by the provisions of Ordinance No. 1, of 1840, which applies exclusively to the Cape Town Municipality, for it is provided in the 18th section that the Board of Commissioners "shall forthwith proceed to frame and agree upon such municipal regulations as the said Commissioners may deem expedient," among other things for preventing and abating public nuisances in the said

municipality, and all and every other purposes of general utility within the said municipality which shall appear to require such regulations. Subsequently Act No. 1, of 1861, was passed by the Legislature, which re-enacted some of the provisions of Ordinance No. 1, of 1840, and gave the Commissioners similar power to frame regulations as before, with the addition that authority was also given to license cabs and other public carriages. Up to that time the Municipal Board consisted of wardmasters and commissioners. That was altered in 1867, and the Town Council as now constituted was created with the powers which had formerly vested in the wardmasters and commissioners separately. There was a difference between the passing of municipal regulations and the assessment of rates, and it was this. The fixing of a rate was done by the commissioners and wardmasters without the interference of the Governor; but the regulations after being passed were submitted for the Governor's approval. There was therefore much more formality in the way regulations were passed. By virtue of these different Acts and Ordinances a great many regulations were passed; and amongst them there were regulations affecting the sale of bread. It will be observed that neither in the Ordinance nor in the Act was there any reference to such a regulation, but notwithstanding this there was provision made for an assize of bread, and every baker who took out a licence was bound to register it at the Town House, for which registry a fee of two shillings and sixpence was charged. There was also a similar regulation as to licences to sell meat. These licences were obtained from the Government, but they had to be registered at the Town House. There was also a regulation in regard to wagons plying for hire, which was not referred to either in the Ordinance or Act. The wording of the regulation for the registry of wagons was almost the same as that of the regulation now under consideration with reference to dogs. The Ordinance and Act further provided that if these regulations were duly passed they should be considered as if inserted in the enactment itself, that is to say they were to become part and parcel of the Ordinance or Act, provided they were not repugnant to or inconsistent with the true intent and meaning of the enactment. As to regulations for abating nuisances, reference was made both in the Ordinance and Act of Parliament. That the keeping of dogs might be a nuisance had been expressly affirmed by the Legislature; for Ordinance No. 16, 1836, was passed "for abating the nuisance occasioned by dogs roaming at large in and about Cape Town." Reference had been made to the decision of the Court in the Graham's Town case, affirming the right of

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the Municipality to impose certain market dues. There is no doubt that this Court should uphold that decision. On all these various grounds I agree with the Chief Justice, that the Magistrate's decision should be affirmed.

Application accordingly refused, with costs.

[Applicant's Attorney, BUISSINNE.
Respondents' Attorneys, FAIRBRIDGE & ARDERNE.]

LEVISOHN vs. WILLIAMS.

Læsio enormis.

Judgment given in favour of the defendant in an action brought to recover the price of a diamond ring sold for £45, the fair marketable value of the ring being not more than £20.

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The defendant was sued in an action of debt for the payment of the sum of £45 sterling, being the purchase price of a diamond ring sold and delivered by the plaintiff to the defendant on the 19th July, 1875.

The defendant pleaded, first, that save as hereafter mentioned, the general issue. Secondly, that in order to induce the defendant to purchase the ring, the plaintiff falsely and fraudulently represented, which said representations the defendant believed to be true, that the diamonds were of the first water, and that the gold in which they were set was of the first quality, and that the ring would in England be worth from £70 to £80, but that for certain reasons the plaintiff was ready and desirous to dispose of it in Cape Town for forty guineas; whereas the defendant had discovered, as the fact was, that the diamonds were of a very inferior sort, and were each and all of them flawed, and that the metal in which they were set was of the lowest quality of gold and gilt, and that the ring was of the value of not exceeding £20, so that if the defendant was compelled to pay forty guineas for the ring she would suffer the *læsio enormis*. Thirdly, that although the purchase and sale was never concluded, yet the plaintiff did send the ring to her, but the defendant refused to keep the same, and long before action tendered and offered it back to the plaintiff, who refused to receive the ring.

The replication was general.

Evidence was led to prove the circumstances attending the sale. It appeared plaintiff had himself given £30 for the ring for the purpose of reselling same. A number of experts and jewellers were called, those for the plaintiff valuing the ring at from £30 trade price to £45 retail price; whilst the defendant's witnesses gave from £14 to £20 as its value.

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Jacobs, A.-G., (with him *Buchanan*) for the plaintiff, contended that a *bonâ fide* purchase and sale had been proved, and that the plea of *læsio enormis* had failed.

Cole (with him *Jones*) for the defendant were not heard.

The Court found as an issue of fact, that the fair marketable value of the ring was not more than £20, and gave the plaintiff the option of reducing the price to that sum or taking the ring back.

The plaintiff elected to have the ring returned to him.

DE VILLIERS, C.J., in giving judgment, said:—I am quite satisfied on the evidence that the fair marketable value of the ring is only £20, and that therefore the sale for £45 was for more than double its value and amounted to *læsio enormis*. There is no necessity to go into the question of fraud. It is quite possible that the plaintiff may have given £30 for the ring and resold it for £45, without any intention to defraud the defendant. The simple question is whether it was sold for a price more than double its fair value. I have no doubt the purchaser did not know she was giving more than double its value when she bought the ring. Taking this view of the facts, the defendant is entitled to the judgment of the Court.

Judgment accordingly for the defendant with costs.

[Plaintiff's Attorney, BUISSINNE.
Defendant's Attorneys, FAIRBRIDGE & ARDERNE.]

[NOTE.—On *læsio enormis* vide *Van der Linden*, p. 234; *Grotius*, 3, 17, 5; 3, 42, 1, *et seq.*; *Van der Keessel*, Th. 896; *Broekman vs. Rens*, 2, *Buch. Menz.*, 100; 2, *Burge*, 473; *Voet*, 18, 5, 3, *et seq.*

No contract is now voidable by reason merely of *læsio enormis*. Vide Act No. 8, 1879, sec. 8.

UNION STEAM SHIP COMPANY (LIMITED) *vs.* THE
TABLE BAY DOCK AND BREAKWATER MANAGEMENT
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Bill of Lading.—Delivery of Goods.—Dock Regulations.

Where a store at the Docks had been hired under the Dock Regulations from the Harbour Board for the purposes of despatch and the convenience of the ship, and goods from the ship were placed in such store by the dock agent employed for that purpose by the agents of the ship, the Board held not responsible to the consignees of such goods for the wrongful delivery to a person not in possession of the bills of lading.

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This was an action for damages. The plaintiffs declared that before and at the time of the committing of the grievances complained of, they were the carriers of goods by water from England to Table Bay; and that in consideration of Messrs. H. & D. Sharpe, of London, causing to be shipped on board the plaintiffs' steamers *Syria*, *African*, and *Anglian* respectively, in the port of Southampton, certain goods of the said H. & D. Sharpe, the plaintiffs, by bills of lading dated the 23rd October, 1874, 4th November, 1874, and 14th November, 1874, promised the said H. & D. Sharpe that the said goods should be delivered at the port of Table Bay to the order of the said H. & D. Sharpe, who endorsed for valuable consideration the bills of lading to the London and South African Bank, whereby the Bank became entitled to have the goods delivered to them in pursuance of the terms of the bills of lading. That the goods duly arrived at the port of Table Bay, and in consideration that the plaintiffs would deliver them to the defendants to be safely kept and taken care of by the defendants for the Bank, and to be delivered after payment of duty to the Bank on production of the bills of lading, for reward to the defendants, the defendants, on or about the 25th November and the 7th and 14th December respectively, promised the plaintiffs to safely keep and take care of the goods, and to deliver them to the Bank, after payment of duty, on production of the bills of lading, in terms thereof and of the regulations framed by the defendants for the working and management of the Docks. That afterwards on or about the 26th December, the Bank

* *Vide* London and South African Bank *vs.* Donald Currie and Co., *ante*, p. 29.

requested delivery of the goods from the defendants, and although all conditions happened, &c., yet the goods were not delivered to the Bank, and the defendants so negligently, carelessly, and improperly conducted themselves in this behalf, that for want of due care in the defendants and their servants, the goods were, in or about the months of November and December, wholly lost to the Bank and to the plaintiffs. That the plaintiffs, by reason of the wrongful and unlawful acts of the defendants, being liable to the Bank in damages, paid to the Bank the value of the goods, namely the sum of £615, and interest from the 24th December, which sum the plaintiffs submitted they were entitled to recover from the defendants as damages for the grievances above stated. The declaration contained a second count, complaining that in consideration that the plaintiffs would deliver to the defendants at the Table Bay Docks the said goods, to be safely kept and taken care of by the defendants, and to be re-delivered at the Docks to the plaintiffs on request, for reward to the defendants, the defendants promised to safely keep and take care of the said goods, and to re-deliver them at the Docks on request; and though re-delivery had been requested, and a reasonable time had elapsed, yet the defendants neglected and refused to re-deliver the goods, to the loss of the plaintiffs in the sum of £615 and interest; wherefore they prayed judgment.

The defendants pleaded, first, the general issue; and specially, that after the arrival here of the said goods they were taken possession of by the duly authorized agents in that behalf of the plaintiffs, and placed in a certain store at the Docks under the care and charge of the said agents, and afterwards, in the month of December, delivered by the said agents of the plaintiffs to the firm of Von Buettner & Company, who then carried on business in Cape Town; and that the said goods were never delivered to the defendants, nor had they the care or custody of the said goods, nor did they undertake the delivery thereof; wherefore the defendants submitted they were not liable to the plaintiffs, and prayed judgment.

The replication was general.

The shipping of the goods in Southampton by Messrs. H. & D. Sharpe, the arrival of the steamers, and the payment by the plaintiffs to the London & South African Bank of the value of the goods, were admitted. The bills of lading were in the ordinary form, and the invoices stated the goods were consigned to order, by order and account and risk of Messrs. Von Buettner & Co. The plaintiffs tendered a written cession of action from the Bank to plaintiffs, but the question of the admis-

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sibility of the document was ordered to stand over. The demand for the delivery of the goods was proved by the correspondence put in. A copy of the Dock Regulations was put in. The rules referred to during the progress of the case were the following :—

24. Every vessel occupying a store berth shall be obliged to take the store and discharge her cargo therein, and shall have the use thereof for ten clear days, if not otherwise required, at the following rates: (rates given). On the expiration of the above periods all goods remaining in store will be subject to warehouse rent.

28. Importers or shippers or persons in charge of goods, must deliver at the Board's office regular landing or shipping warrants in duplicate in the forms prescribed, which shall specify the respective marks and numbers of the packages, their number, description, and contents, with the weights and measurements of solid and the number of gallons of liquid contained in any package; also the name of the ship, master, and port the goods are from or intended for, and there must be separate landing or shipping warrants for each ship, and for each separate consignee or shipper; and all importers or shippers shall when called upon produce their bills of lading.

34. The Board will not hold itself responsible for leakage, loss of weight or measure, or for deterioration on such goods as may be deposited in their warehouses, or otherwise in their charge.

The following evidence was called on behalf of the plaintiffs :—

John Wallace :—I am accountant in the London and South African Bank, Cape Town, and recollect receiving certain bills of lading from Messrs. H. & D. Sharpe, of London, in December last, endorsed to the order of the Bank. We have never received the goods. On making application to Mr. Traviss, the wharfinger at one of the dock warehouses, alongside where the steamers lie, I was informed the goods had been delivered to Behrens, Von Buettner's forwarding agent. He did not say by whom. Traviss is a servant of the defendants. I at once wrote a letter to the Secretary to the Harbour Board, which the Manager of the Bank signed.

William Martin Behrens :—I am a shipping and landing agent, and in December last received certain goods for Von Buettner & Co. I only produced the invoices when I obtained the goods. I applied for them first to the custom-house officer and then to the wharfinger, Mr. Traviss. I got a custom-house order, on which I received the goods, which were delivered by Messrs. Hutton & Co. I asked if I could take away the goods, and was told if the dock warrant was passed I could. Before the goods were taken away the dock warrants were produced, and Hutton & Co.'s men put the goods on the wagon. Hutton & Co. are Messrs. Anderson's dock agents, and they are also employed by

others. I paid them for this work. All this time Travis was about the store.

Cross-examined:—I paid Hutton & Co. for landing and loading up on the wagon. Hutton & Co. land all the goods from the mail steamers and put them in the store. They are the recognised landing agents of the Union Company. Before getting goods from the docks, you must pay customs duty as well as dock dues. I produced documents to show that customs duty had been paid, and I then paid the dock dues, and there was nothing then to prevent getting the goods. I applied to Hutton & Co. as the persons who land the goods from the steamers and put them into the store, and not as ordinary carriers of goods. I had my own wagons to take away the goods. I adopted what is the customary practice. Thode & Co. formerly acted as agents for Anderson & Co., and were succeeded by Hutton & Co. I was in the service of Thode & Co. Thode & Co. used to land from the ship, put the goods in the store, and load on the wagons, and that has been the custom since.

Re-examined:—I paid Hutton & Co. a shilling a ton for landing the goods and putting them on the wagon.

William George Anderson, jun.:—I am a partner in the firm of W. Anderson & Co., agents for the Union Company. The mail steamers occupy what is called a store berth. We obtain a store upon application to the customs, and always occupy the same, on the East Quay. We pay a rent of £5 for each steamer to the Harbour Board. That rent was paid for the use of the store in connection with the goods in question. The customs officer and wharfinger take charge of the store, and the latter is a servant of the Harbour Board. The wharfinger is not our servant. At that time Hutton & Co. were our dock agents, and they acted as carriers from the vessel to the store where the cargo is placed. They had no authority from us to deliver the goods to Von Buettner or his agent. At no time has any servant of ours had charge of the store or its contents. The Dock Regulations are issued by the Harbour Board. Hutton & Co. are employed by others as well as by our firm. We regarded them merely as ordinary dock agents; and they only take the goods from the ship and place them in the store.

Cross-examined:—We apply for the store as a temporary Queen's warehouse, and make use of it for the purpose of despatch. The rent is paid under the 26th Regulation. By the Regulations we are forced to employ dock agents. The consignees do not interfere with them taking goods

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into the store. We never have to retain goods for the payment of freight, as it is invariably paid in England. The customs authorities keep the keys of the store; in summer it is open from eight till five. The wharfinger looks after the dock dues. We have no agreement with Hutton & Co., beyond their appointment as dock agents. If we want to get goods from the steamers ourselves, we send an order down to Hutton & Co., or anybody else. I believe we have stopped the delivery of goods, acting in our capacity as agents for the ship, on account of the Standard Bank, who held bills of lading. We sent a memorandum to the wharfinger. We may have instructed Hutton & Co., I cannot be certain.

David C. Barry:—I was formerly clerk to Messrs. Hutton & Co. As dock agents for the Union Company their business is to land cargo and place it in the shed, or on the wagon if it is cleared. With that their duties cease. When the goods in question were landed the locker and wharfinger were present. Anderson & Co. do not have anyone in charge of the store. Hutton & Co. are paid by the consignees.

Plaintiffs thereupon closed their case.

Jacobs, A.-G. (with him *Cole*), for the defendants, applied for absolution from the instance. The agreement or undertaking alleged in the declaration upon which the action was founded had not been proved, nor was it shown that the defendants ever became custodians of the goods. The plaintiffs' own agents delivered the goods to Von Buettner, and all the defendants had done was to protect the revenue.

Uppington (with him *Maasdorp*), for the plaintiffs, contended that the declaration had been fully established. By the Dock Regulations it appeared the defendants were in the position of warehousemen, and the receipt of the goods by them imposed a liability to deliver them to the proper persons. By non-compliance with their own regulations requiring the production of the bills of lading, the defendants had caused a loss to the plaintiffs. There was sufficient evidence to support a *prima facie* case of bailment, and of negligence and improper conduct on the part of the defendants.

Jacobs, A.-G., replied.

DE VILLIERS, C.J., said:—I have not the slightest doubt as to what the judgment of the Court ought to be in this case. The plaintiffs sued the defendants upon what is virtually a contract of bailment; that the plaintiffs

had delivered over these goods to the defendants to keep, and that the defendants had broken their contract in not re-delivering these goods when requested to do so. The first question is, in order to establish the bailment, in whose custody were the goods really placed? The plaintiffs have proved that they hired a warehouse for a certain time, for which they paid a specified rent, and that this warehouse was in charge of two persons, one of them being a servant of the Customs authorities, and the other the servant of the defendants. The former is called a locker and the other a wharfinger. But when we come to enquire more particularly into the duties of these persons, we find they are there not so much to see that the goods are delivered to the proper parties, as for the purpose of seeing that no goods are taken away unless the Customs duties and dock dues are paid. There is no proof that they are there to see that the goods are delivered to the proper persons. Mr. *Upington* quoted the 28th Dock Regulation to show that the Board themselves require bills of lading to be produced, but that rule is not applicable to the present case. The claim against the Board here is not that they did not require the bill of lading before granting a dock warrant, but that they did not demand the bill of lading before they actually delivered the goods. There is a distinction between the two cases. The object of the 28th Regulation is for the protection of the Board and not for the protection of the consignees. It is to enable the authorities to ascertain for themselves what is the value of the goods, and to judge what amount is to be paid upon them. The plaintiffs cannot rely on this Regulation, which, as I have said, is for the protection of the Board, and not for the protection of the consignees or ship's agents. At the same time there might be some doubt whether, as the Harbour Board have chosen to use the word "warehouse" in their own Regulations, that does not construe them warehousemen, so as to render them liable; but I think the mere fact of the word "warehouse" being used in the Regulations is not sufficient to fix any liability upon the Harbour Board. But, assuming for the moment that they are bailies, and are bound to deliver up these goods to the plaintiffs, what have the plaintiffs themselves proved? That the custom has been for the ship's agents to employ certain dock agents, and that these dock agents under this custom not only landed goods and placed them in the store, but also put them on the wagons. It is true that Mr. Anderson says he never gave Hutton & Co. any express authority to do so; but the firm are supposed to know what their agents are doing in the ordinary course of business.

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The witness Behrens told us that while he was in the service of Messrs. Thode, the predecessors of Hutton & Co., it was invariably the practice of these agents not only to land the goods and put them into the warehouse, but also to load them up on the wagons, and that such custom had been since followed. Mr. Barry who was in the service of Hutton & Co. gave evidence to a similar effect. It would be contrary to all principles of justice to hold that the plaintiffs, who had, through their agents, loaded the goods on to the wagons, could hold the Board responsible for what the plaintiffs' own agents had done. There must be absolution from the instance with costs.

DENYSSEN, J., said:—I am of the same opinion. It is necessary for the plaintiffs to satisfy the Court that the defendants were not only the custodians of these goods, but also that they were bound to make due delivery of them, and in my opinion, in both instances, they have signally failed. The warehouse or store is nothing more than the hold of the ship. If the plaintiffs had not hired the store for the purpose of dispatch and their own convenience, they would have had to land the goods from the ship's side at the expense of the consignees; and they are equally bound now, with reference to the custody and delivery of the goods. It is true that a wharfinger and locker were there, but that was simply and solely to protect the revenue; and there is no evidence to show that at any time these people were employed to undertake the custody or delivery of the goods. I think the plaintiffs have wholly failed in substantiating their case, and there must therefore be absolution from the instance with costs.

Absolution granted accordingly, with costs.

[Plaintiffs' Attorneys, FAIRBRIDGE & ARDERNE.]
[Defendants' Attorneys, REID & NEPHEW.]

Judgment affirmed on appeal. Vide *Phillips and others vs. Graham and others* (6 Buch. S. C. Rep., 1876, p. 111).

In re BENJAMIN.

Insolvency.—Compulsory Sequestration.—Ordinance No. 6, 1843, secs. 9, 117.—Review of Judge's Order.

A Judge's Order for the sequestration of the private estate of a partner residing in England but having property in this Colony, granted on the surrender of the estate of a partnership carrying on business in this Colony, set aside, such partner not having been summoned to show cause why his estate should not be adjudged sequestrated.

Michael Benjamin, Abraham L. Benjamin, and Henry Benjamin traded together in this Colony under the style of Benjamin Brothers. The estate of the partnership was surrendered on the 2nd January, 1875, by the local partners, A. L. Benjamin and H. Benjamin, as insolvent. On the same day, Hyam Benjamin presented a petition to a Judge in Chambers, and represented that he was a creditor on the estate for about £27,000, and that the estate of the firm would not pay ten shillings in the pound; that the individual members of the firm were possessed of property belonging to their private estates, and that one of them, viz., Michael Benjamin, was possessed of landed property of considerable value, although not sufficient to satisfy all the claims against the partnership; and that it was most desirable, for the protection of the interests of the creditors, that the private estates of the individual partners should be sequestrated. Thereupon Mr. Justice Dwyer ordered that the private estates of the several partners of the firm of Benjamin Brothers be sequestrated for the benefit of the general body of creditors.

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Henry Isaac Benjamin, in his capacity as the colonial agent of Michael Benjamin of London, one of the partners in the firm of Benjamin Brothers, petitioned the Supreme Court, setting forth the above facts, and further stating that no process was issued by the petitioning creditor against Michael Benjamin or any person representing him in this Colony, calling upon him to show cause why his estate should not be adjudged to be finally sequestrated, as required by section 117, of Ordinance No. 6, of 1843; and that without the knowledge of the said Michael Benjamin, and, contrary to the provisions of the said Ordinance, upon the said petition of Hyam Benjamin, his estate was declared finally sequestrated, and was now in the administration of

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E. Morris and B. B. Attwell as joint trustees. That neither the said Michael Benjamin nor any of his private creditors had an opportunity afforded them of showing cause against the sequestration; and that by reason of the said final order the private London creditors of Michael Benjamin had been greatly injured and damnified. Wherefore he prayed leave to bring the order, finally sequestrating the estate of Michael Benjamin, under review, and that he be permitted to take further proceedings thereon.

The Court granted a rule *nisi*, to be served on the trustees and on Hyam Benjamin, requiring them to show cause why the application should not be granted.

(August 19),—

Jacobs, A.-G., for the trustees and petitioning creditor, appeared to show cause. He contended that the 9th section of the Insolvent Ordinance contemplated such a case as the present. On the day that the partnership estate was surrendered it was competent to order the sequestration of the private estates of the partners. The Judge under this section might even have included such a direction in the order made on the surrender of the partnership estate, on being satisfied of the insolvency of the parties. The affidavits disclosed a large debt due to the petitioning creditor, and that the assets of all the estates would be insufficient to liquidate the liabilities. He cited *Simpson & Co. vs. Fleck*, 3, *Buch. Menz.*, 215.

Buchanan, for the applicant, was not called on to reply.

DE VILLIERS, C.J., said:—It is quite possible that the estate of Michael Benjamin may be insolvent, but the Ordinance provides that a certain course shall be followed before any estate can be sequestrated, and the Court is bound to follow the terms of the Ordinance. The Insolvent Ordinance No. 6, 1843, first provides for the voluntary surrender of estates, then for their compulsory sequestration. The 9th section, which has been relied on, treats of the compulsory sequestration of partnership estates, and it expressly provides that after the presentation of the petition and Judge's order thereon, the like proceedings shall follow as are provided to take place concerning other estates, that is, other estates placed under compulsory sequestration. The order granted in the first instance is merely a provisional order. There must be a summons taken out in the usual way, and an opportunity given to the person to

show cause against the sequestration. In the present case the partnership estate was surrendered voluntarily, but there was no surrender of the private estates of the individual partners, and before such estates can be compulsorily sequestered the individual partners must be summoned to show cause. Here Michael Benjamin had received no notice whatever before the sequestration of his estate. The order for its sequestration must be set aside, as also must all the subsequent proceedings taken thereon.

1875.
August 2.
" 19.
In re Benjamin.

Ordered accordingly, with costs.

[Applicant's Attorneys, REID & NEPHEW.
Respondents' Attorneys, FAIRBRIDGE & ARDERNE.

Ex parte DE WET.

Privileged Will.

A document written and signed by a parent, dividing his property among his children, is a privileged testament, and is valid as a last will, although not executed with the formalities required by Ordinance No. 15, 1845.

Johannes de Wet, LL.D., by a document written and signed by him, dated April, 1873, but not witnessed, instituted his two daughters his sole and universal heiresses, and appointed them sole executrices of his estate. After Mr. De Wet's death his daughters lodged the document in the Master's Office, and applied to have issued to them letters of administration thereunder to administer their father's estate. The Master declined to grant the letters of administration without an order of Court.

1875.
August 19.
Ex parte De Wet.

Jacobs, A.-G., for the daughters, now applied, after notice had been served on the Master, for an order authorizing the Master to issue to applicants letters of administration under the document.

The Master did not appear; but it was intimated that in terms of section 20, of Ordinance No. 104, he awaited the decision of the Court on the validity and legal effect of the document in question.

Jacobs, A.-G., for the applicants, stated that the objection of the Master was that this document was not a will executed in conformity with Ordinance No. 15, 1845. But this being a holograph will, was a privileged testament, and did not come under the provisions of that Ordinance. A will by a parent disposing of his property among his children did not require to be witnessed. This appeared to

1875.
August 19.
Ex parte De
Wet.

have been decided by this Court in the case of *Executors of Eaton vs. Eaton*,* reported in the *Advertiser and Mail* of the 7th March, 1863. [*Et vide Tennant's Notary's Manual*, p. 52; *Grotius* 2, 17, 28; *Cen. For.*, 3, 2, 19; *Van Leeuwen's Com.*, Eng. ed., p. 215; 4, *Burge*, 406; *Voet*, 28, 1, 15, and 16; *Holl. Cons.*, *Vervolg*, b. 1, cons. cxx., p. 414.]

The Court granted the order as prayed.

[Applicants' Attorneys, REDDLINGHUIS & WESSELS.]

BOTMA vs. RETIEF.

Seduction.

In an action of damages for seduction, the benefit of the doubt on the evidence ought to be given in favour of the defendant.

1875.
August 24.
" 26.
Botma vs.
Retief.

This was an action by a girl aged twenty-one, living at Tulbagh, against the defendant, an auctioneer, residing at Piquetberg, for £500 damages for seduction alleged to have taken place in February, 1874, and for £3 a month maintenance of a child born on the 11th November, 1874.

The defendant pleaded the general issue.

Jacobs, A.-G. (with him *Kotzé*), for the plaintiff, in support of the claim, called the plaintiff herself, who swore positively to the seduction, and detailed the circumstances. A relative of the plaintiff's gave evidence that she saw the defendant take plaintiff round the waist on the stoep, that they afterwards went inside, when she left the two together and went to bed. Another young girl stated she saw plaintiff sitting on defendant's lap in the "voorhuis."

Cole (with him *Upington*), for the defendant, examined the defendant, who swore positively that he had had no connection with the plaintiff. They also called three witnesses who said it was impossible the defendant could have been with the plaintiff on the evening in question, as they were all together at a boarding house in Tulbagh. Evidence was given that defendant never saw the plaintiff after the evening in February, and no letter was written or demand made on him until after the child was born.

DE VILLIERS, C.J., in giving judgment, said:—After carefully considering this case, I confess the probability seems to me slightly in favour of the plaintiff, but only

* See Appendix, *post*, p. 173.

slightly. She is supported in regard to her statement that she was taken round the waist and sat on defendant's lap by two witnesses. It would not be necessary to attribute perjury to the defendant's witnesses to hold that they were wrong in stating the defendant was not away that night, because what happened eighteen months ago is quite possible to have escaped their memory; whereas if what the plaintiff's witnesses stated was not correct they must have committed perjury, as they positively swore to a fact they could not have been mistaken about. The weight of evidence, therefore, seems to be slightly in favour of the plaintiff; but on the other hand, the defendant positively swears he did not have connection with the plaintiff, and there are the several witnesses who stated that he was with them that evening and could not possibly have left. A case of this kind I am inclined to treat as I would a criminal case. If this had been a criminal charge, I would have charged the jury that however much suspicion there might be, or although they might think the weight of evidence was slightly in favour of the prosecution, still, in a case of so much doubt, the prisoner was entitled to the benefit of it. I think that a jury under such circumstances would not have found the defendant guilty. I have, moreover, in this case less hesitation in finding in favour of the defendant, as my brother DENYSSEN thinks that the probabilities are rather in his favour. As the case, therefore, is one of a very doubtful nature, and one in which the benefit of any doubt ought, upon the weight of the authorities on the Roman-Dutch law, to be given in favour of the defendant, I think there should be absolution from the instance.

1876.
August 24.
„ 26.
—
Botma vs.
Retief.

DENYSSEN, J.:—I am of the same opinion, and fully concur with the judgment of the Chief Justice, which gives the plaintiff an opportunity of bringing on the case again if so advised, if better evidence is forthcoming. It also occurred to me that this case should be disposed of as if it had been a criminal one. If the defendant had been on his trial I think there would not have been sufficient evidence to have convicted him, and I would have charged the jury that there being a reasonable doubt they ought to give the prisoner the benefit of it. I think absolution from the instance is, under the circumstances, the only judgment that should be given.

Absolution from the instance accordingly, with costs.

[Plaintiff's Attorney, DE KORTE.
Defendant's Attorney, C. C. DE VILLIERS.]

DE VILLIERS vs. THE CAPE DIVISIONAL COUNCIL.

Costs Summons.—Survey and Plans.

Counsel's fee for settling summons and attorneys' charges incident thereon, allowed as between party and party.

The expenses of a surveyor in and about a survey and in the preparation of plans which were used at the trial, allowed against the unsuccessful party.

1875.
August 2.
" 26.
De Villiers vs.
The Cape
Divisional
Council.

In the taxation of the plaintiff's bill of costs in the case of *De Villiers vs. The Cape Divisional Council* (*ante*, p. 50), the Master disallowed, as between party and party, a charge of a guinea and a half for Counsel's fee for settling summons, and all fees to the Attorney for work connected therewith. The Master further allocated only two guineas out of an account of £17 10s., claimed on behalf of Land Surveyor Borchers for "resurvey of part of the farm and gravel quarries thereon, plan of same supplied, searches, &c., and attendance at the Supreme Court." The plaintiff now brought the Master's taxation under review. His attorney's affidavit stated that the case was of an entirely novel nature, and of sufficient consequence to warrant the settling of the summons by counsel; and further, that in order to bring the case in a proper form before the Court it became necessary to employ a surveyor and to cause a plan to be framed.

There were no answering affidavits.

Jacobs, A.-G., for the plaintiff, contended that the charges ought to be allowed. The principle in England was not to allow preliminary expenses which were incurred for the purpose of qualifying a witness to give evidence, but to allow such expenses as were necessary to enable the Court to understand the merits of the case. (*Holmes vs. Holmes*, 2, Bing., 75; *Pilgrim vs. Southampton and Dorchester Railway Co.*, 8, C.B., 25.) The plan in this case was used at the trial. As to the charge for summons, this was a case involving an important principle, and the charge was a fair one to be allowed.

Cole (with him *Buchanan*), for the defendants, supported the Master's taxation. The summons was a simple one for trespass, and it was not usual to employ Counsel except in difficult or complicated cases. The plans were unnecessary, and the issue might have been tried without reference to them.

The Court, as it was stated the plans had been of use to one of their Lordships in assisting at arriving at an under-

standing of the case, ordered that the expenses of the Surveyor and the charge for plans be allowed in taxation against the unsuccessful party. The charges for summons were also to be allowed. The case was an important one, and the very simplicity of the summons might have been due to the fact of its having been settled by Counsel.

1875.
August 2,
" 26.
—
De Villiers vs.
The Cape
Divisional
Council.

Application granted with costs.

[Plaintiff's Attorney, C. C. DE VILLIERS.]
[Defendants' Attorney, MOORE.]

LONDON AND SOUTH AFRICAN BANK *vs.* STRATFORD'S
TRUSTEES.

Insolvency.—Ordinance No. 6, 1843, sec. 108.

The period allowed by the 108th section of Ordinance No. 6, 1843, to Trustees of an Insolvent Estate, within which to file their account, having elapsed, and no extension of time having been applied for, the Court, on the application of a creditor, ordered an account to be filed, notwithstanding the allegation that the funds in the hands of the Trustees were comparatively small, and that legal proceedings were pending relative to assets of the estate.

The Court subsequently refused to grant an extension of time to the Trustees within which to file their account.

Jacobs, A.-G., for the London and South African Bank, moved upon notice for an order on the Trustees of the insolvent estate of James Stratford, junior, directing them forthwith to file a proper liquidation and distribution account of their administration of the estate.

1875.
August 26.
September 13.
—
London and
South African
Bank vs. Strat-
ford's Trustees.

Buchanan, for the Trustees, opposed, and put in their affidavit setting forth that they were appointed trustees in October, 1873, at which time there were 209 bales of wool in the possession of the insolvent, the ownership of which was in dispute. That the Trustees were authorized to sell this wool on condition of placing the proceeds in the London and South African Bank pending proceedings to be instituted by the said Bank or by the trustees. That the wool was sold and the proceeds so deposited, and the Trustees commenced proceedings in the Circuit Court for Port Elizabeth in May, 1874, to have it declared that the appropriation by the Bank of 178 bales of the said wool

1875.
August 26.
September 13.

London and
South African
Bank vs. Strat-
ford's Trustees.

was an undue preference, when judgment was given in favour of the Bank, which judgment was afterwards affirmed on appeal by the Supreme Court; whereupon the Trustees, at the request of the general body of creditors, noted an appeal to the Privy Council, which appeal was awaiting the opinion of Counsel in England before being prosecuted. That the London and South African Bank still held the proceeds of the sale of the wool, and that the funds in the hands of the Trustees were comparatively small; and that it was entirely owing to the fact of the applicants not having taken proceedings to have the question of the claim to the 209 bales of wool settled, that no account had been filed; and that the Trustees were prepared, immediately on the settlement of the question of proprietorship and the final decision of the Privy Council, to file a first and final liquidation account.

Jacobs, A.-G., urged that the facts stated afforded no answer to the application. He cited *Norden vs. Brink*, 3, *Buch. Menz.*, 270.

The Court ordered the Trustees to file a liquidation account within one month, and to pay the costs of this application.

Postea (September 13),—

Buchanan, for the Trustees, moved *ex parte*, under the 108th section of the Insolvent Ordinance, for an extension of time until the 25th January next within which to file an account. The Trustees stated they had applied to the Eastern Districts' Court for leave to withdraw £3,000 from the London and South African Bank, in order to enable them to file the account ordered by the Court, which motion came on for hearing on the 24th August, and was, at the instance of the Bank, postponed to the 26th August, when the Trustees were put under terms to commence an action to be tried on the 1st November next. That there was no object to be gained in filing the account as the amount in the hands of the Trustees was comparatively small, and the general body of creditors other than the Bank did not wish an account to be filed until the ownership of the 209 bales of wool had been determined.

The Court refused to vary the previous order, and dismissed the application.

[Applicants' Attorneys, FAIRBRIDGE & ARDERNE.
Respondents' Attorneys, REID & NEPHEW.]

DE VILLIERS *vs.* THE CAPE DIVISIONAL COUNCIL.

Appeal to Privy Council.—Charter of Justice, sec. 50.

An appeal to the Privy Council allowed in an action brought for £25 damages, a perpetual interdict, and a declaration of right, the right in question being of the value of £500.

The defendants lodged a petition for leave to appeal to the Privy Council from the judgment of the Supreme Court given in the case of *De Villiers vs. the Cape Divisional Council* (*ante*, p. 50.) The original action was for £25 damages for trespass in removing gravel, &c., from plaintiff's land, for a perpetual interdict, and for a declaration of rights. The defendants justified, alleging that, as plaintiff's land was held on quit-rent tenure, they were by law entitled to take material therefrom for the purposes of making and repairing main roads.

Cole (with him *Buchanan*), for the defendants, moved on the petition for leave to appeal. In support of the application was read the affidavit of Abraham Green, which stated that there was a large supply of gravel to be obtained from defendant's property, and that the value thereof to the Divisional Council was £500. Also the affidavit of Joseph Storr Lister, Secretary to the Council and Inspector of Roads for the Division, stating that the gravel on adjoining properties was more or less exhausted, while that on plaintiff's land was good in quality and abundant in quantity, and that in consequence of an interdict obtained by a proprietor in the immediate neighbourhood, the Council would find great difficulty in obtaining elsewhere material for the maintenance of the main road; and that the gravel on plaintiff's property was worth £500 to the Council.

Jacobs, A.-G., for the plaintiff, opposed the appeal, and read the affidavit of plaintiff's attorney, from which it appeared that he had offered the gravel to the Council for the sum of £250, the removal not to extend over more than ten or twelve years, "feeling convinced that if the Council paid £250 they would be paying double the value of the gravel." Counsel contended that under these circumstances it did not appear that the right in dispute was of the value of £500, which was the limit of value required by the 50th section of the Charter of Justice. It was open to the defendants to petition the Privy Council for leave to appeal on special grounds (*vide* Charter of Justice, sec. 51), as had

1875.
July 12.
August 2.
" 31.
De Villiers *vs.*
The Cape
Divisional
Council.

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August 2.
" 31.

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Divisional
Council.

been done in *Brown vs. McLaughan*, 3 L. R., P. C., 458, where it was alleged the decision of the Court involved a question of general public interest.

The Court held the case to come fairly within the 50th section of the Charter of Justice, the judgment involving directly and indirectly a right amounting to the value of £500.

Leave to appeal granted accordingly; no order as to costs.

[Plaintiff's Attorney, C. C. DE VILLIERS.]
[Defendants' Attorney, MOORE.]

WEHMEYER vs. WEHMEYER.

Pleading.—Set-off.

Exception to a set-off pleaded to a claim by the plaintiff in his individual capacity, that the amount sought to be set-off was due by the plaintiff in his capacity as an executor, sustained.

1875.
September 2.

Wehmeyer vs.
Wehmeyer.

G. W. B. Wehmeyer was summoned to answer M. P. Wehmeyer in an action of debt. Plaintiff's declaration claimed the sum of £114 7s. 9d. as being due for money lent and cash advanced, as shown by an account annexed thereto.

The defendant in his plea admitted that he was indebted in the sum claimed, but alleged that the plaintiff was indebted to him in a much larger amount, for that in or about March, 1873, the plaintiff and his then wife were indebted to the defendant in the sum of £1,260 15s. 7½d., according to an account annexed to the plea; that in the said month of March the plaintiff's wife died and the plaintiff was appointed her executor; that the defendant duly lodged his claim against the joint estate, and that at the commencement of this action there was due to the defendant on account of his claim the sum of £270 2s. 11½d., which he was entitled and was willing to set-off against the claim of the plaintiff. Defendant further claimed in reconvention the sum of £155 15s. 2½d., being the difference of the sum due to him out of the joint estate and the amount of plaintiff's claim; which sum defendant alleged

the plaintiff owed both in his individual capacity and in his capacity as executor of his deceased wife.

Plaintiff excepted to the plea on the following grounds:—First, that the defendant could not set-off the amount claimed in the plea, inasmuch as it was due, if at all, from the plaintiff, not in his individual capacity, but in his capacity as executor. Secondly, that the plea did not show how the amount therein mentioned and sought to be set-off was arrived at. Thirdly, that no dates were given to many of the items of the account, by reason whereof the plaintiff was embarrassed and unable to reply to the same. The plaintiff replied over, and also excepted to the claim in reconvention for similar reasons.

Jacobs, A.-G. (with him *Jones*), for the plaintiff, supported the exceptions. The plea showed that the counter-claim was demanded from the plaintiff in his capacity as executor, and therefore it ought not to be brought into this action. The absence of dates in the account was embarrassing as the plaintiff had a plea of prescription to many of the items.

Maasdorp, for the defendant, replied that the claim mentioned in the plea was made against the plaintiff in his individual capacity. The mention of him as executor was only matter of narrative. As husband, the plaintiff was liable personally for the whole of the debt due by him and his wife jointly. (*Grot.*, 2, 11, 17.) At the least the plaintiff would be liable for half the debt, which was more than the sum he claimed from defendant. As to the account, the items which were not identified by date were identified by the persons to whom they were paid.

DE VILLIERS, C.J.:—I am always unwilling to allow exceptions upon purely technical points, but in the present case, the exceptions are not of that kind. The defendant's plea sets forth that the plaintiff and his wife owed him a certain sum of money, that the wife died, and the plaintiff was appointed executor, and that a claim had been made upon him in his capacity as such for this debt. Virtually, then, the defendant claimed from the plaintiff a debt due by him in his capacity as executor. As the plaintiff sued in his individual capacity, this debt could not be set-off in this action. Taking this view, it is unnecessary now to decide how far the plaintiff's liability as husband extended. The defendant should make his election either to sue plaintiff in his individual capacity or in that of executor. If he sued him in his individual capacity he, of course, could not only set-off this debt, but could also claim it in reconvention. But the plea would leave it uncertain in what

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Wehmeyer vs.
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Wehmeyer.

capacity the plaintiff was sued, and it was of great importance to the plaintiff to know how he was sued by the defendant. If the defendant sued him as executor it must be done by a separate action. (*Voet*, 5, 1, 81.) The exceptions applied equally to the claim in reconvention as to the plea. The exception taken to the incompleteness of the account was also not merely a formal one, but was a substantial objection. In reconvention the defendant became the plaintiff, and it therefore was his duty to show clearly upon his account the exact amount due and how it was arrived at. Many of the items of the account framed by the defendant were without dates, and while the account showed a balance of some £1,250, by the claim made it appeared that only £270 was sued for, and there were no means supplied of ascertaining how this amount was arrived at. Both exceptions must be allowed.

DENYSSEN, J., concurred.

Exceptions allowed with costs.

[Plaintiff's Attorney, C. C. DE VILLIERS.
Defendant's Attorneys, FAIRBRIDGE & ARDERNE.]

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1875.

PART IV.

CAWOOD BROTHERS *vs.* BENJAMIN.*

Insolvency.—Compulsory Sequestration.—Ordinance No. 6, 1843, sec. 4.

The residence in England of a partner in a firm which had become insolvent in this Colony, such firm being indebted upon promissory notes given for debts contracted after the partner had left the Colony, is not per se an act of insolvency on the part of such partner.

Jacobs, A.G., presented a petition from Cawood Brothers, Howse, Reynolds & Co., and Wood Brothers, all of Graham's Town, alleging that Michael Benjamin of London, and one of the partners in the firm of Benjamin Brothers of Graham's Town, was justly and truly indebted to the petitioners in the manner following: To Cawood Brothers in the sum of £2,327 15s. 4d., upon a promissory note made and signed by Benjamin Brothers, dated 1st September, 1874, payable four months after date, now due and unpaid; to Howse, Reynolds & Co., in the sum of £202 11s. 6d., upon a promissory note made and signed by Benjamin Brothers, dated 1st December, 1874, payable three months after date, now due and unpaid; and to the firm of Wood Brothers, in the sum of £315 upon a promissory note made and signed by Benjamin Brothers, dated 17th September, 1874, payable on the 1st April, 1875, also now overdue and unpaid. That on the 2nd January, 1875, the estate of the firm of Benjamin Brothers was surrendered as insolvent. That the said

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Sept 13.
Cawood
Brothers *vs.*
Benjamin.

* *Vide In re Benjamin, ante, p. 117.*

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—
Cawood
Brothers vs.
Benjamin.

Michael Benjamin was possessed of property in this Colony, but he being in England remained absent from this Colony with intent to defeat and delay his creditors in obtaining payment of their just debts then due and owing, whereby he committed an act of insolvency. Whereupon the petitioners prayed the sequestration of the private estate of the said Michael Benjamin.

The Court granted an order as prayed, summons to be issued and served on M. Benjamin's agents in this Colony, returnable 13th September.

(September 13th),—

Buchanan, for M. Benjamin, showed cause against the final adjudication of sequestration, and put in the affidavit of L. A. Benjamin, the agent in this Colony of Michael Benjamin, in which it was stated that the alleged act of insolvency set forth was untrue, because at the time the several petitioners became creditors of the firm of Benjamin Brothers, Michael Benjamin was to the knowledge of the petitioners residing in London, and had never been in the Colony since their debts were contracted, and could not therefore have absented himself with intent to defeat or delay his creditors in the payment of their debts.

The Court discharged the provisional order for the sequestration, with costs, as the circumstances stated did not amount to an act of insolvency within the meaning of the 4th section of the Insolvent Ordinance.

[Petitioners' Attorneys, FAIRBRIDGE & ARDERNE.]
[Respondent's Attorneys, REID & NEPHEW.]

ALCOCK vs. DU PREEZ.

Liability of Co-Debtors.—Absentee joint purchaser.

Where two persons have together bought land, but without specially rendering themselves liable in solidum, and one of the purchasers leaves the Colony, the other, who has paid his full share of the purchase price, cannot be compelled to pay the balance due by the absentee purchaser.

1875.
Oct. 19.
Nov. 23.
—
Alcock vs. Du
Preez.

The defendant was sued in the Circuit Court at Oudtshoorn, held on the 19th October, 1875, before DE VILLIERS, C.J., in an action of debt. The plaintiff declared that on the 16th May, 1865, he sold to the defendant

and one Cornelis du Preez, certain shares in the farms Matjes Rivier and Geswintskraal for the sum of £390, upon the terms amongst others that the last instalment of £75 should be paid by the purchasers upon the receipt by them of transfer. That the defendant and the said Cornelis du Preez entered upon the occupation of the property, and the defendant still was in possession, but Cornelis du Preez had left the Colony, and was at present residing out of the jurisdiction of the Supreme Court. That the plaintiff had tendered transfer, but the defendant refused to pay the said last instalment of £75.

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The defendant pleaded, first, prescription; secondly, the general issue; and then specially, that by the contract of sale the defendant and Cornelis du Preez were not bound as co-principal debtors, but that each was liable only for his own share of the purchase money, and that the defendant had paid in full one-half share of the capital, and also interest; and that the defendant and Cornelis du Preez had not renounced the legal benefit *de duobus vel pluribus reis debendi*, or any other exception.

The replication was general.

At the Circuit Court, *Maasdorp*, for the plaintiff, led evidence and cited *Grotius* in support of his claim, to the effect set forth in the judgment below. *Upington*, for the defendant, led evidence and argued *contra*. By consent of the parties the case was then removed for decision in the Supreme Court without further argument.

In the Supreme Court (November 23),—

DE VILLIERS, C.J., in giving judgment, said:—This is an action to recover from the defendant the balance of the price of certain land purchased by him and his brother from the plaintiff. The agreement of sale was written in duplicate, but the plaintiff and defendant having both lost their documents, parole evidence was admitted at the trial to prove the sale. The case was tried before me at the last Oudtshoorn Circuit Court, and from the evidence I was satisfied that neither of the purchasers renounced the benefit of division, or entered into any special agreement rendering himself liable *in solidum*, and that the defendant has, in fact, paid to the plaintiff more than one-half of the price agreed upon. It appeared, however, that before the action was brought the defendant's brother had left the Colony, and the plaintiff on this ground claimed the right of suing the defendant alone for the whole of the balance still due. In support of this claim a passage from *Grotius* (3, 3, 10) was quoted, where it is said that the necessity of citing all the co-debtors,

1875.
Oct. 19.
Nov. 23.
—
Alcock vs. Du
Preez.

as also the division of the debt between them, does not take place if one of them is notoriously insolvent or absent from the country. As it was impossible to ascertain on Circuit whether this naked proposition is supported by the authorities quoted by *Grotius*, or by any other authority, the case was, by consent of Counsel on both sides, removed to the Supreme Court for its decision without further argument. Under the ancient Roman law the question whether co-obligors were liable *in solidum* depended upon the terms of each contract (*Inst.* 3, 16); but as this rule created a great deal of uncertainty in the determination of actions arising from contracts, *Justinian*, by one of his latest constitutions, laid down the general rule that two or more co-obligors should never be deemed to be *rei debendi*, and liable *in solidum*, unless a special agreement to that effect existed between the parties. (See *Groenewegen ad Cod.* 8, 40, *auth.*). In the *Code* (8, 40, *auth. hoc ita*) it is provided that where there is a special agreement that each should be liable *in solidum*, then, in case of the insolvency or absence of one co-obligor, the other should be liable to be sued for the whole debt, but that where there is no such special agreement, they will bear the burden in equal shares. It is this passage upon which *Grotius* relies for the proposition laid down by him, and it is clear therefore that he must be understood with the qualification that the co-obligors had expressly agreed that they should be liable *in solidum*. This view is supported by another authority quoted in the English edition of *Grotius*, viz., *Groenewegen (ad Cod.* 8, 41, *auth. praesente)*. Referring to the liability of sureties, he says that "in Amsterdam the established practice is that where two sureties have bound themselves *in solidum* (elk een voor al), one of them can only be sued for the whole debt, in case the other surety is absent, and possesses no property situated within the jurisdiction of Amsterdam; but he nowhere attaches this liability to sureties who have undertaken the simple obligation of suretyship without binding themselves *in solidum*. In the present case there is no evidence that the purchasers agreed to be severally liable for the whole of the debt, and the passage from *Grotius* is therefore inapplicable. The defendant having already paid more than his proportionate share of the debt must have judgment in his favour, with costs.

[Plaintiff's Attorney, LIND.
Defendant's Attorney, MOSTERT.]

VAN DER SPUY vs. PILLANS.

Negligence.—Attorney.

An attorney is supposed to be reasonably proficient in his calling, and is liable in damages if he does not bestow sufficient care and attention in the conduct of business entrusted to him.

Where a plaintiff in an action in which absolution from the instance had been given, sued his attorney for negligence, and it appeared that had the said action proceeded to a conclusion judgment would have been given for the defendant, the attorney was held not liable in damages.

C. J. M. van der Spuy sued C. S. Pillans in an action of damages. The Plaintiff alleged that in consideration that he detained and employed the defendant as an attorney, to bring, prosecute, and conduct a certain action in the Circuit Court for the division of Beaufort West, by and at the suit of the plaintiff against one P. J. Naudé for the recovery of £30, claimed to be due to the plaintiff from the said Naudé, in fees and reward to the defendant in that behalf, the defendant accepted such retainer and undertook the employment, and promised the plaintiff to bring, prosecute, and conduct the said action with due and proper care, skill, and diligence, yet the defendant did not use proper care, skill, and diligence in and about the bringing, prosecuting, and conducting the said action, but on the contrary thereof the said defendant as such attorney as aforesaid then brought, prosecuted, and conducted the said action in so careless, irregular, unskilful and improper a manner, contrary to his duty as such attorney as aforesaid, that by reason thereof the proceedings of the defendant in the said action as such attorney as aforesaid, afterwards, to wit, on the 10th April, 1875, became and were futile and unavailing, and the plaintiff did not succeed but was defeated therein, and was forced to suffer himself to be and was non-suited therein, and absolution from the instance with costs granted to the said Naudé, and the plaintiff thereby lost the costs and expenses incurred by him in prosecuting the said action, and was obliged to pay the costs incurred by the said Naudé in defending the same, in all amounting to £111 18s. 11d. sterling; and the plaintiff had been delayed in recovering the said money, and was otherwise injured to the damage of the plaintiff in the said sum of £30. Wherefore he prayed judgment.

The defendant pleaded the general issue.

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BEAUFORT WEST (October 9th).—

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The cause was heard before DE VILLIERS, C.J., as the Circuit Judge.

Buchanan appeared for the plaintiff; and *Maasdorp* for the defendant.

It appeared that van der Spuy had sued Kinnear in the Court of the Resident Magistrate on a promissory note for £34 8s. At the hearing an exception was taken on behalf of Kinnear, founded on the improper stamping of the note, which exception was subsequently sustained and the case dismissed with costs. Van der Spuy, knowing that the case would be dismissed, instructed the defendant Pillans to institute fresh proceedings, upon which Naudé verbally agreed to interpose as surety to the extent of £30. After some time, the money not being paid, Van der Spuy again sued Kinnear, who thereupon surrendered his estate. Van der Spuy instructed Pillans to take Counsel's opinion on the liability of Naudé, and a case was drawn up on a statement of facts framed by Van der Spuy, and Van der Spuy was again consulted before the case was laid before Counsel. Thereafter a summons was taken out by Pillans against Naudé, calling upon him to show cause why he should not be condemned to pay to Van der Spuy the sum of £30 due by him as the surety or guarantee of one Edward Kinnear, under the following circumstances, *i.e.*, "On or about the 14th day of August, 1874, the said Van der Spuy, who was the lawful holder of a certain promissory note for £34 8s. made in his favour by the said Kinnear, issued a summons in the Court of the Resident Magistrate of Beaufort West against the said Kinnear upon the said note; whereupon the said Naudé interposed himself as a surety or guarantee, and verbally covenanted, promised, and agreed that if the said summons was withdrawn the said Naudé would undertake himself to pay the plaintiff the sum of £30 in part satisfaction of the said promissory note, upon which contract, promise, agreement and suretyship and guarantee the said Van der Spuy withdrew the summons against the said Kinnear, who has since surrendered his estate as insolvent." This case was tried at the Beaufort West Circuit on the 10th April, 1875, before DENYSSEN, J., when it appeared from the evidence that the consideration for Naudé paying the debt was that Van der Spuy was to abstain from taking further proceedings against Kinnear. Under these circumstances at the close of the plaintiff's case absolution from the instance was given with costs.

During the evidence, it was stated that the presiding

Judge in the case of *Van der Spuy vs. Naudé* had at the trial expressed his regret at being compelled to grant absolution from the instance. After hearing the witnesses, the documentary evidence, and Counsel, the cause was removed to the Supreme Court for decision without further argument.

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In the Supreme Court (November 23),—

DE VILLIERS, C.J., in giving judgment, said:—This was an action brought by Van der Spuy in the Circuit Court of Beaufort West against Chas. Stuart Pillans, an attorney of the Supreme Court, for damages incurred through his negligence in the conduct of a case brought at the suit of Van der Spuy against one Naudé. The grounds of the charges of negligence were that this attorney, in the conduct of that cause, had wrongly stated the case for the opinion of Counsel and had wrongly drawn up the summons, so that the defendant had obtained absolution from the instance, and the plaintiff had been prevented from obtaining a decision on his claim. As to the first ground, that Counsel had been wrongly instructed, that formed no part of the declaration. The summons was for negligence in the conduct of that cause, and there was no allegation that he had wrongly instructed Counsel. But even if this could be considered as included in the summons, I am not satisfied from the evidence that there was such negligence, because Van der Spuy had been consulted by Pillans, and knew what had been submitted to Counsel. The further question then remains whether in the conduct of the cause itself there was such negligence on the part of Pillans as to make him liable. I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be reasonably proficient in his calling, and if he does not bestow sufficient care and attention, in the conduct of business entrusted to him, he is liable; and where this is proved the Court will give damages against him. In the present case I am not satisfied that there has been such a want of reasonable care on the part of Pillans. I have referred to Mr. Justice DENYSSEN's notes as to what occurred in the case against Naudé which was tried before him on Circuit, and in that case it appears to me that Van der Spuy's evidence was rather contradictory with itself. Now the form in which the action was brought against Naudé in the Circuit Court was an action against him as a surety for Kinnear, the consideration being alleged to be that a certain case then pending should be withdrawn. What was proved before the Circuit Court was that Naudé

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promised he would be surety if no further proceedings were taken. If the action had been brought against Naudé on the consideration that no further proceedings were to be taken against Kinnear, then in my opinion in that case judgment must have been for the defendant. How then can Van der Spuy recover damages when judgment would have been against him? It was rather in his favour that absolution from the instance was given, and he was in a better position than if judgment had been against him, so that it has not been proved that he suffered any damage. Then, if the suretyship of Naudé was on condition that the action should be withdrawn, the summons issued by Pillans was correct, and no action could be maintained against him on that ground. It was stated in Court that the Judge who tried the case had, in giving absolution from the instance, expressed his regret in having to do so, leaving it to be inferred that but for the discrepancy alleged he would have given judgment for the plaintiff. I have consulted with Mr. Justice DENYSSEN, and he has no recollection of the circumstance. This, then, removed the only doubt I had in my mind which I expressed at the trial. I think if the case of Naudé had been heard throughout, judgment would have been for the defendant, for it was proved that Van der Spuy, instead of taking no further proceedings against Kinnear, had, after the undertaking of Naudé, actually instituted fresh proceedings against him, and therefore had himself broken his own contract, and released Naudé from his liability. I have no hesitation therefore in giving judgment for the defendant with costs.

DENYSSEN, J., said:—Upon referring to my notes in the case of *Van der Spuy vs. Naudé*, I find the judgment I gave was absolution from the instance with costs. I find no note, nor do I think it likely, that I said anything about doing so with regret. I do not remember saying anything of the kind.

Judgment accordingly for defendant with costs.

[Plaintiff's Attorneys, CHRISTIE & DU PREEZ.]
[Defendant's Attorney, DE SMIDT.]

MAASDORP vs. MALAN.

Trespass.—Exception of non-joinder.

Exception of non-joinder of plaintiffs, in an action of trespass, &c., on the ground that the land trespassed upon was in the occupation of the plaintiff, to be worked by

him on condition of his dividing the crops raised with the owner of the land, overruled.

The plaintiff sued the defendant in the Court of the Resident Magistrate for Somerset East, for damages sustained by reason of the trespass of the defendant's cattle on certain lands cultivated by the plaintiff, and for unlawfully rescuing the said cattle which had been seized and sent to the pound. The defendant excepted to the summons on the ground that the land on which the trespass had been committed had been hired by the plaintiff from one Schoeman, who was to receive half the crops, and that the said Schoeman had not joined in suing. The Magistrate held the exception good, and granted absolution from the instance with costs. From this judgment the plaintiff appealed.

Jacobs, A.G. (with him *Buchanan*), for the appellant, submitted that the Magistrate should have overruled the exception, the plaintiff having sufficient title in the ground and crops to entitle him to sue.

Cole, for the respondent contended that Schoeman should have joined in suing, otherwise the defendant might be liable for the same damage to two different persons.

The Court allowed the appeal, and overruled the exception with costs.

[Appellant's Attorney, VAN ZYL.
Respondent's Attorneys, FAIRBRIDGE & ARDERNE.]

QUEEN vs. JANTJE ANDROO.

Wild Ostrich Act, No. 15, 1875.

A servant of a co-proprietor in undivided shares in a farm, acting under the instructions of his master, is not punishable criminally, under the provisions of Act No. 15, 1875, for removing the eggs of wild ostriches found on such farm, though such removal was against the wishes of the other co-proprietors of the farm.

Jantje Androo was charged before the Resident Magistrate of Clanwilliam for contravening the provisions of the 2nd section of Act No. 15, 1875, in having removed sixteen eggs of wild ostriches from a nest found on a farm in that district. The prisoner's master, Mr. Fryer, was a co-proprietor in undivided shares in the farm, but having comparatively a small interest therein. The eggs had been removed by the prisoner acting under his master's orders.

1875.
Nov. 24.
*Maasdorp vs.
Malan.*

1875.
Nov. 25.
*Queen vs.
Jantje Androo.*

1875.
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Another co-proprietor who had the largest interest in the farm had found the nest, and had set a person to watch it. The eggs were removed without his knowledge or consent. The Magistrate found the prisoner guilty, and sentenced him to a fine of £3 for every egg removed, or to be imprisoned for six months with hard labour.

Buchanan, for the prisoner, contended that the conviction was bad. The words of the 3rd section of the Act making it lawful for "any owner or occupier of land" to take the eggs of wild ostriches, protected a person acting on the instructions of a co-proprietor.

Jacobs, A.G., for the Crown, appeared to support the Magistrate's decision.

The Court held that the facts stated did not amount to a contravention of the Act, and quashed the conviction.

[Applicant's Attorney, VAN ZYL.]

ALIWAL NORTH MUNICIPALITY vs. OXER AND SMITH.

Ordinance No. 9, 1836.—Ordinance No. 8, 1848, sec. 2.—Act No. 2, 1860, sec. 11.—Interdict.—Municipal Lands.

An injunction which had been granted, interdicting a Municipality from selling a portion of a market place, set aside.

1875.
Nov. 25.
Aliwal North
Municipality vs.
Oxer and Smith.

Application was made to the Eastern Districts' Court in Chambers, on behalf of J. Oxer and P. E. J. Smith, upon notice given to the Commissioners of the Municipality of Aliwal North, for an interdict restraining the said Commissioners from selling, disposing, or alienating portions of the market place of that town. The application was supported by the affidavits of Mr. Oxer and Mr. Smith, which stated that they were the registered owners of certain erven in Aliwal North abutting upon and bounded by the said market place, upon which erven were erected stores and buildings of considerable value, and that the value of the said property would be materially depreciated by the sale of erven in the immediate vicinity. That the Municipality had advertised for sale certain portions of the said market place near deponents' property in lots. That the condition upon which the Governor had granted authority to sell was that the owners of property abutting upon the market place should receive compensation. That no compensation had

been ascertained or offered to deponents. That there were other lands which the Commissioners could dispose of without affecting the rights of owners of property situated within the Municipality.

1875.
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For the Municipality were produced the affidavit of Land Surveyor Dowling, formerly a Municipal Commissioner, which set forth that the market place as originally laid out was an unusually large and irregular space of ground far exceeding the requirements of the town; that from an inspection of the original title deeds and diagrams he concluded that in the first instance it was never contemplated that the whole of the irregular figure called the "market place" should be reserved for that purpose; that after making the deductions contemplated by the Commissioners, a market place of ample dimensions for the requirements of the town was left; and that the proposed reduction would be of great public convenience. And the affidavit of H. S. Caldecott, Chairman of the Municipality, stating that a resolution of the Commissioners was taken at a special meeting held on the 11th April, 1874, that application should be made to the Governor for the grant of the land in question for the purpose of selling the same to raise funds for providing a better water supply to the town; that thereafter the Commissioners gave notice of their intention in terms of section 2, of Ordinance No. 8, 1848, and that neither of the applicants lodged any objection, though several other persons did; that a meeting of householders was held on the 3rd June, 1874, when a resolution was passed affirming the action of the Commissioners, and leaving the matter entirely in their hands; that all the facts were communicated to the Governor, who, on the 8th January, 1875, under the 11th section of Act No. 2, 1860, granted title to the Commissioners of the land they proposed to sell, and in the said title deed it was distinctly specified in what manner and for what purpose the proceeds to be derived from the sale were to be applied, but making no condition about compensation to any person whatever; and finally, that the allegation of probable depreciation in the value of the erven in question was purely speculative.

Mr. Smith, in an answering affidavit, stated he with other holders of erven, had lodged an objection against the alienation of the market place. From the records of the Municipality it appeared that the following was one of the resolutions passed at the meeting of Commissioners held on the 11th April, 1874:—"That to meet any question of damage to existing erven having a frontage on the market place, the Municipal Commissioners agree to refer such questions to arbitration."

1875.
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Aliwal North
Municipality vs.
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On the above application and affidavits, Mr. Justice SMITH, on the 5th March, 1875, granted an order interdicting and restraining the Municipality from alienating any portion of the market place, with costs. This order was afterwards confirmed by the Eastern Districts' Court, and the Municipality now appealed therefrom.

Jacobs, A.G., (with him *Cole*), for the Municipality, submitted that Messrs. Oxer and Smith had no legal rights by grant, prescription, or otherwise, upon which they could found a claim for an interdict. The utmost they might claim would be a right to refer to arbitration any claim they might conceive they had for damages, and that question was not now before the Court. The injunction granted by the Eastern Districts' Court ought therefore to be dissolved.

Upington (with him *Kotzé*), for Messrs. Oxer and Smith, opposed. On reference to Ordinance No. 9, 1836, section 39, Ordinance No. 8, 1848, section 2, and Act No. 2, 1860, schedule, section 11, it would be seen that the only land within a Municipality that the Government could empower the Municipal Commissioners to sell, were waste lands assigned for pasturage purposes. The market place was not such land, and was inalienable, except by permission of the Legislature. Where it was intended such land might be sold, special provisions had to be made, as was done by the Cape Town Municipality Act, No. 1, 1861, section 75.

Jacobs, A.G., replied. The provisions of Act No. 2, 1860, were not limited to pasturage, but extended to other lands within municipal limits.

DE VILLIERS, C.J., said: I feel no doubt in this case. The land in question seems to be land within the limits of the Municipality which has been used as a market place, though the *dominium* remained in the Crown. The Crown has now made a grant of that land on certain conditions to the Municipality. The Court cannot go behind that grant now. If the applicants contend there has been any wrong done by the Government in making that grant, they should first proceed to have the grant set aside. Until that is done the Court is bound by the grant. The 11th section of Act No. 2, 1860, is not confined only to lands assigned as pasturage, as was contended for on behalf of the applicants, but the Governor had the power to grant or authorize the sale of any municipal lands, subject to the provisions of the Act. There is another reason why this interdict should not be granted. There is no allegation that without it the applicants would be remediless, or that the appellants are not in the position to give ample compensation for any injury done to the respondents.

DENYSSEN, J., said:—I am of the same opinion. The Court cannot now go behind the title deed. It has not been shown that there was any clear right vested in the applicants which had been infringed as is essential to entitle them to an interdict. An interdict is a remedy of a summary nature, and to obtain this remedy a clear right must be shown. If the alleged right be of a doubtful nature, it is not fit to be decided upon in a summary manner.

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Aliwal North
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Oxer and Smith.

Injunction accordingly, with costs.

[Applicants' Attorneys, REID AND NEPHEW.
Respondents' Attorneys, FAIRBRIDGE & ARDERNE.]

HOFMEYR vs. HOFMEYR.

Interdict.—Trespass to Right of Way.

Interdict granted, restraining the defendant from conveying the drainage water from his property into a ditch passing through land over which the plaintiff had a right of way.

A question of infringement on a right of way can be properly tried in the form of an action of trespass.

Johannes Jacob Hofmeyr was summoned to answer the plaintiff, Jan Hendrik Hofmeyr, in an action for trespass.

Plaintiff's declaration stated that he was the proprietor of certain lots of land being Nos. 2, 3, 4, 5, and 6, of the sub-divided estate Welgemeend, in Table Valley, as by deed of transfer dated 13th December, 1870, would more fully appear. That by such transfer he was, together with the proprietor of lot No. 1 of the said estate, entitled to the use of a certain road running between certain oak trees and the north west boundary of his lots, of the width of sixteen feet, which said road was to be further increased in width by the additional space of nine feet, as soon as the present proprietor of the major part of the said estate or his successors should decide to sub-divide the said greater part into allotments, when the same was to become a public road. That the defendant was the proprietor of certain property called "Sweet Repose," situated on the other side of the said road as it now existed, and beyond the nine feet reserved to be added to the road on the happening of the contingency before mentioned. That the defendant had wrongfully and unlawfully laid down a certain pipe, by means of which he conveyed the waste water, kitchen refuse,

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Nov. 23.
" 30.
Hofmeyr vs.
Hofmeyr.

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" 30.
—
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and other dirt and debris from his house and premises across the said nine feet of ground upon and into a certain ditch within the said road of sixteen feet, thereby wrongfully interfering with the plaintiff's rightful use of the said road, and fouling the said ditch thereon, and causing him much damage and inconvenience. Wherefore he prayed judgment for £25 damages; that the defendant be ordered to remove the said pipe; and for a perpetual interdict restraining the defendant from again laying down the same or any other pipe, or in any way trespassing upon the said road; and for further relief and costs.

The defendant admitted the proprietorship of the several properties by the plaintiff and defendant respectively, and pleaded, first, the general issue. Then, specially, that long before the plaintiff and defendant became such proprietors, their said properties, together with the land now being the said road of sixteen feet and the said additional space of nine feet, was the property of one J. H. Hofmeyr, senior, the father of the defendant, and was undivided, and the said road and additional space did not exist as such; that about the year 1857, the said Hofmeyr, senior, sold the portion called "Sweet Repose" to the defendant, and the buildings thereon were erected under the superintendence, full knowledge, permission, and consent of the said Hofmeyr, senior, and the said pipe was also shortly afterwards laid down with the like knowledge, permission, and consent, for the purpose of conveying the waste water, &c. (which before then had been conveyed in an open ditch), from the said premises into the said ditch; that the said Hofmeyr, senior, died in January, 1862, and after his death the land was sub-divided and the said road and additional space laid out, and that afterwards the portion called "Sweet Repose" was transferred by his executrix to the defendant, and the lots belonging to the plaintiff were then sold and transferred to one Leibbrandt, who again sold and transferred to the plaintiff in 1870; that from the time of the laying down of the said pipe during the remainder of the lifetime of Hofmeyr, senior, the time his executrix was in possession, and the time the property was owned by Leibbrandt, the said pipe was with their full knowledge, permission, and consent used by defendant free and undisturbed and without complaint, of all which the plaintiff when he became proprietor had full notice; that by reason of these several premises the defendant was entitled to continue and use the said pipe; wherefore he prayed judgment with costs.

The replication was general.

Cole (with him *Buchanan*), for the plaintiff, put in the deeds of transfer showing the right of road reserved to the

plaintiff as stated in the declaration; also an admission on behalf of defendant that the pipe from his premises emptied itself into an open ditch running down the said sixteen feet of land. It appeared that this ditch carried off surplus water from several properties situated on a higher level than plaintiff's land. Evidence was called to show the drainage caused the ground to be marshy at times. The plaintiff denied any notice or knowledge of the existence of the pipe previous to his purchasing the property.

Jacobs, A.G. (with him *Jones*), for the defendant, led evidence to support the averments of the special plea. It was shown that no road had ever been actually constructed over the sixteen feet of land in question. The defendant had acted for the executrix in the sub-division of the estate and in passing transfer of the property. Counsel contended that the action had been brought in an improper form, and that the plaintiff could not sue for damages for trespass on land which was not his property. Further, that no interference with the plaintiff's right had been proved, as no road was actually in existence, and therefore no action for damages had accrued.

Cole, for the plaintiff, replied.

The Court intimated that the plaintiff was entitled to an interdict, and that judgment would be given on a subsequent day.

Postea (November 30th),—

DE VILLIERS, C.J., in giving judgment, said:—Under his transfer the plaintiff has a right of way sixteen feet in width from the boundary of his own land, and beyond this there is another nine feet reserved for a public road on the occurrence of a certain event. It has been proved in evidence that the drain or pipe complained of was constructed during the lifetime of defendant's father, and that after the father's death the defendant was the administrator of his estate, and he was the person who sold the lots now owned by the plaintiff, and he then also got transfer of his own share. It has been argued on behalf of the defendant that inasmuch as this drain was made during the lifetime of the father, who was the owner of the whole of the property, the defendant retained the right to use it and to allow the water to flow therefrom over the land over which the plaintiff has his right of way. But against this contention there is the subsequent deed of transfer to the defendant, to the passing of which he himself was a party as agent of the transferor, and in this transfer there is no

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reservation of such a right over this sixteen feet way. There is no dispute that plaintiff has a right of road extending to sixteen feet over the land between the trees and the boundary of his own land. The only question now to be decided is whether there has been any such act on the part of the defendant as to entitle the plaintiff to bring this action. It has been proved in evidence that there is a ditch running along the whole of this sixteen feet way which drains the water from other properties, and that the water which comes through defendant's pipe falls into this ditch; and the question arises whether this gives the plaintiff a right to interdict the defendant from continuing to get rid of his drainage by this means. On this point it was argued for the defendant that this action was wrongly brought to attain that object, and it was said this contention was supported by English cases. But I find that in England nothing is more common than for such rights to be tested in actions for trespass, and I hold this action is properly brought. But it was also argued that no damages could have been sustained and none could be given. But it is clear this drainage water must interfere with the right of the plaintiff, and though the actual damage he may suffer is small, yet it is such an infringement of his right that the Court will take cognisance of it. A most instructive case on this point is that of *Lee vs. Stephenson*, *El. Bl. & El.*, 512. In that case the plaintiff had the right to a sewer through the defendant's land, and the defendant sent a small portion of his own drainage into the plaintiff's sewer, for which act the Court gave damages as for trespass. This case is very much in point. As between the present plaintiff and defendant, the plaintiff would have the right to convert the ditch into a covered ditch or barrel drain, and it would be an act of trespass for the defendant to run his drainage into it. I do not say what the plaintiff's rights may be as between him and the owners of the other lots above his land who may be entitled to use the ditch; I am referring only to his rights as against the defendant. The plaintiff certainly might have the right to convert his open ditch into a barrel drain, but the defendant can have no such right. There are several cases in *Gale on Easements* to the same effect regarding injury to a right of way. It will be unnecessary to give damages in this case, but I see no other course open to the Court than to grant an interdict, restraining the defendant from allowing his drainage water to flow within the sixteen feet reserved for the road. It may be said that it is hard on the defendant to be so interdicted, his father having constructed this drain; but the

defendant had it in his own power to have guarded against this when he gave and received the transfer. As to costs, I would have allowed the ordinary rule to have prevailed; but as there is some difference on the Bench regarding them, and as I do not feel strongly on the point, there will be no order.

DENYSSEN, J., said:—This case in my opinion ought never to have been brought into Court, for it might easily have been settled between the parties. As to the dispute itself, it is clear the defendant has no right to encroach on the sixteen feet reserved for the road, and an interdict must be granted as regards such encroachment. That part of defendant's pipe which extends into the sixteen feet way must be removed. As to costs, I think the ordinary rule ought not in this case to be followed, and each party should pay his own costs.

Judgment for plaintiff accordingly for an interdict as prayed. No order as to costs.

[Plaintiff's Attorney, C. C. DE VILLIERS.
Defendant's Attorneys, FAIRBRIDGE & ARDERNE.]

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Nov. 23.
" 30.
Hofmeyr vs.
Hofmeyr.

DE JAGER vs. BRYANT.

Libel.—Newspaper.

Damages recovered against the proprietor of a newspaper for maliciously publishing a letter criticising the private and public acts of the plaintiff, and exposing him to ridicule and contempt.

James Bryant, the editor and proprietor of a newspaper called the *Beaufort Courier*, was summoned to answer Peter Jacobus de Jager, of Beaufort West, a general agent and auctioneer, in an action of damages for defamation. The action was founded on the publication of the following letter in the defendant's newspaper, of the 28th May, 1875:—

1875.
Dec. 1.
De Jager vs.
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“ADVERTISEMENT.—A WARNING VOICE.

“*To the Editor of the Beaufort Courier:*

“SIR,—I suppose you will not object to publish a few words from one who does not trouble you often with complaints. Having been many years in this place, I know the characters of all very well, and am not often surprised:

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when I hear of strange things being done by some men amongst us. I saw and heard something last week which really did a little startle me, and which I think ought to be published. You may put it in how you like, and I will pay all costs and stand by what I say.

"That obnoxious individual, named —, who has lately been compelled to give up farming as unfitted for it, and who has come into town to gratify his craving to be somebody! This individual you will be surprised to hear, having been snubbed in one quarter for his treachery and double dealing is trying to gain favour among the more ignorant classes by misrepresenting the writings of the local Editor, in regard to the Rev. De Villiers—a man, he Mr. —, has held up to ridicule in the Cape papers, and trying to induce them to give up the *Courier*, which is their real friend, and not his glib-tongued nonentity, who has failed at everything he has yet tried, and who will fail in his present efforts to gain popularity and business by traducing others.

"I will here tell this Mr. — that the Rev. De Villiers knows him too well to be deceived by his pretended friendship, and that he is making the greatest mistake in assuming the leadership of the rag-tag and bob-tail of the town—men who are as capable of judging of questions like that of the trees, as so many baviaans from the hill. Yes, Sir, he is making a great mistake by taking up such a position, because he sets himself in opposition to reason and common sense, and will gain the contempt of every right-thinking man.

"I would advise this individual to leave political and local questions to those who are capable of understanding them, and for once mind his own business. I have known men of his calibre, pretensions, and aspirations, who not unfrequently go to the wall, despite the support of a large family-connection, and that he had better bear in mind the well-known proverb, 'Shoemaker, stick to your last.'

"ONE WHO KNOWS WELL."

"May 26, 1875."

"[Though the foregoing appears as an advertisement, it does not follow that we may not exercise our editorial privilege, in modifying it to some extent, and we therefore omit the gentleman's name alluded to, though we are not sure that he will not like this way of gaining notoriety.—
ED. B. C.]"

The defendant pleaded the general issue.

The printing and publishing by the defendant of the alleged libel was admitted, and also that the blanks in the advertisement were meant for the plaintiff.

Among the correspondence put in evidence was the following letter from the defendant to the plaintiff:—

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Dec. 1.

"Courier" Office, May 25, 1875.

De Jager vs.
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"P. J. DE JAGER, ESQ.

"DEAR SIR,—I have received a letter this morning for publication as an advertisement, from a highly respectable inhabitant of this town, and on whom I had always looked as being a friend of yours. In this letter the writer charges you by name with, among other things, taking [an antagonistic position towards me in the matter of the little difference of opinion between the Rev. Mr. de Villiers and myself, and in trying to get certain persons to give up the paper, and misinterpreting the sense of my remarks concerning the said gentleman, &c.

"You will understand that I do not question your right to act as you please—to be my enemy or my friend—nor is it the question of a few subscribers more or less that concerns me. If I were to be moved by such trifles I would never have started a paper in a place like Beaufort. It is the fact of a serious charge of this kind being published against a man whom I have always considered a friend, and who has to get his living among the people who may be thus prejudiced against him by said charges. I am always careful to draw the line tightly between a man's private and public character. Hence it is that I wish to know from yourself whether there is any truth in the statement 'that P. de Jager, after being snubbed 'for his treachery and double dealing in one quarter, is trying to curry 'favour among the more ignorant classes, by misrepresenting the writings 'of the local editor regarding the Dutch minister,—a man he (de Jager) 'has held up to ridicule in the Cape papers—and advising said persons 'to give up the *Courier*, which is their friend.'

"There is a lot more of the same kind in said letter, but that is the only passage which concerns myself. I would have come down to talk the matter over with you, but my foot is still sore. However, 'yes' or 'no' from you will put me in a position to deal properly with the communication in question.

"You will notice that your name is in full, and the writer insisting upon its appearing so is the chief reason of my thus communicating with you on the point.

"Please drop me a line at once, and oblige,

"Yours truly,
"J. BRYANT."

To this the plaintiff replied on the 26th May, that he would reserve a further reply on the subject until the advertisement of his alleged friend had appeared; trusting that his friend would have the courage to sign his real name to his production.

The plaintiff deposed that the allegations against him contained in the libel were untrue, and that his business had been injured in consequence of its publication, and that it had also caused him to be laughed at and ridiculed. He did not wish for special damages, but only to vindicate his name. Mr. van der Spuy, a capitalist and chairman of the Municipality, stated he had ceased business transactions with the plaintiff, and would not renew them until he cleared himself from the charges made against him. He admitted there was a good deal of political feeling existing in Beaufort.

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No evidence was led for the defendant.

Jacobs, A.G. (with him *Buchanan*), for the plaintiff, submitted that it had been proved the defendant had been actuated by malice, and not by a conscientious desire to discharge a public duty. The private character of the plaintiff had been attacked, and the charges of treachery and double dealing, and of having failed in all he had tried, were more particularly calculated to injure him in his business.

Cole, for the defendant, admitted that the advertisement in question was not the production of "the polite letter-writer," but it was absurd to call it a libel, and a sillier case he had never seen brought into Court. Had he seen the advertisement himself in the paper headed "A Warning Voice," the probability was that he would have taken it for a religious tract. Calling a man "an obnoxious individual" was not libellous, nor to say that a man had been compelled to give up farming because he was unfitted for it. As to the assertion that "he had been snubbed for his treachery and double dealing," that must be read in connection with the rest of the sentence, when it would plainly appear that it had no reference to the plaintiff in his private capacity. It referred to his misrepresentations of the writings of the editor in regard to the Rev. Mr. De Villiers. If this was libellous every newspaper in the Colony would have an action for libel against the other, for all the editors were more or less engaged in misrepresenting one another's writings. Then as to being called a "glib-tongued nonentity," no doubt that was very disagreeable, but to say that it was a libel was absurd. The plaintiff was also accused of assuming the leadership of the rag-tag and bob-tail of the town, which, as he took it, had reference to political parties. The plaintiff occupied a public position, and there was not a single political man in this Colony, who had made any name, in regard to whom a thousand times stronger language had not been used; and no doubt their Lordships even had had stronger terms applied to themselves. There was nothing throughout the whole of the advertisement which could be called libellous.

Jacobs, A.G., in reply, called attention to the fact that from the defendant's own letter it appeared that he considered the publication of the libel would be injurious to the plaintiff.

DE VILLIERS, C.J., in giving judgment, said:—In this case, in consequence of the admissions which have been made, there are no disputed facts. There are only two questions before the Court; first, is this letter actionable?

And secondly, what damages ought to be given to the plaintiff? Now when a man takes part in public acts he must expect criticism of such public acts; for, as had been said by the Counsel for the defendant, no man had ever filled any public position in this Colony who had not been frequently exposed to ridicule, perhaps far greater than in the present instance; indeed, not only ridicule, but very often something worse. The question was, whether newspapers did not frequently go beyond fair criticism of public acts, and often in their articles and advertisements import an amount of malice which the Court would be justified in taking into consideration when the case actually came before it. In the present case it was not merely the criticism of the public acts of the man, but there was a mixture of the public and private conduct of Mr. De Jager in the attack made upon him. If the intention of the defendant was to criticise only the plaintiff's public acts, what necessity was there for saying that he had failed at everything he tried? It is difficult to seize upon any particular passage in the advertisement and say that it amounts to defamation, but the whole must be read together; and any one reading it with an unprejudiced mind must see that it was written with malice aforethought, and with the object of traducing the plaintiff and influencing people not to employ him in his private business. It is more than a fair criticism of his public conduct in regard to municipal and other affairs. The advertisement must also be read in connection with the letter of the 25th of May, and the dates seem certainly very extraordinary. The letter written from the *Courier* Office, saying that a letter had been received from an estimable and respected inhabitant in the town was dated May 25th, and the letter in question headed "A Warning Voice," was dated the 26th. This looked very strange, and made it appear as if it was the intention of the defendant, owing to some spite he had against the plaintiff, to retaliate upon him by means of this advertisement. This impression is inevitable, and if it was a case of private revenge on the part of the defendant, and he maliciously exposed the plaintiff to ridicule and contempt, then this advertisement is actionable and the Court is bound to pronounce for the plaintiff. The question then arises as to the amount of damages, and on this point, the plaintiff very fairly said his object was not to obtain vindictive damages but to vindicate his character and reputation, which he has certainly succeeded in doing. Under all the circumstances I think the justice of the case will be met by giving judgment for the plaintiff for £10 damages.

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DENYSSSEN, J., said:—I am of the same opinion, that judgment should be for the plaintiff, with small damages. I am far from desiring to repress fair and just criticism by the press of the public acts of individuals; but it appears to me that in this case the proper bounds of newspaper criticism have been exceeded, and there evidently had been a malicious motive influencing the defendant. This is shown by that letter of the 25th May which has been put in. The advertisement upon which the libel is founded contains offensive and opprobrious expressions, and imputes to the plaintiff conduct which, if the allegations were allowed to go unchallenged, would induce the public to withdraw their confidence from the defendant in his business.

Judgment accordingly for the plaintiff, for £10 damages and costs.

[Plaintiff's Attorney, TIRAN.
Defendant's Attorneys, FAIRBRIDGE & ARDERNE.]

RENDWALDSON vs. WEISS.

Magistrate's Jurisdiction.—Marriage.—Abduction.

In an action of damages for the abduction of Plaintiff's Wife, for her restoration to the plaintiff and for an interdict against harbouring her, the Defendant took exception to the Magistrate's jurisdiction on the ground that the suit raised an issue as to validity of Plaintiff's marriage. The Magistrate sustained the exception, and on appeal the Court confirmed the Magistrate's decision.

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The plaintiff sued the defendant in the Court of the Resident Magistrate of Port Elizabeth for damages. The summons set forth:—"That heretofore, to wit, on the 17th day of June last past, the said plaintiff was lawfully married to Mary Catherine Woolf, in Port Elizabeth, and that on the same day the said defendant wrongfully and unlawfully and violently abducted the said Mary Catherine Woolf from the said plaintiff, and conveyed her to his own house contrary to law, and against the will of the said Mary Catherine Woolf and her husband the said plaintiff; and the said plaintiff further saith that the said defendant, although often requested to allow the plaintiff's said wife to return and live with the said plaintiff, who has from the date of his said marriage and thence hitherto been and still is able and willing to support and maintain and keep her

as his said wife, of all which the defendant had due notice, hath refused so to do, and still harbours and detains and keeps from him his said wife, whereby and by reason whereof the said plaintiff has suffered great wrongs and injuries and has sustained damages to the amount of £20 sterling. Wherefore the said plaintiff prays that the said defendant may be ordered to restore to him his said wife, and may by order of this Court be interdicted from harbouring her, and that he be adjudged to pay to the said plaintiff as and for damages the sum of £20, and the costs of this suit." Before pleading, the defendant's attorney took exception to the jurisdiction of the Court, on the ground that the Magistrate would have first to try the validity of the marriage, before it could enter on the claim for abduction. The Magistrate sustained the exception, and dismissed the case as being beyond his jurisdiction. From this judgment the plaintiff appealed.

Jacobs, A.G., for the plaintiff and appellant, contended that the Magistrate was wrong in allowing the exception to the whole action, part at least of the claims made being within his jurisdiction. It was the duty of the Magistrate to have gone into the evidence, and if it appeared that the validity of the marriage was really in dispute then he could have stopped the case, but he was wrong in stopping it *initio litis* merely because an exception of want of jurisdiction was taken. The Magistrate could have adjudicated on the claim for damages without his judgment affecting the question of the validity of the marriage. The matters beyond the Magistrate's jurisdiction only appeared in the prayer to the summons. Even if upon the face of the pleadings it appeared that some of the causes of action were within the jurisdiction of his Court, though there were others beyond such jurisdiction, the Magistrate was bound to try those over which he had jurisdiction. He cited *Myburgh vs. Cloete*, 3, Buch. Menz., 564; *Lilley vs. Harvey*, 5, D. & L., 648; *Carlake vs. Mappedoram*, 2, T.R., 473; *Hallack vs. Cambridge University*, 1, Q.B., 593; *Reg. vs. Twiss*, 4, L.R., Q.B., 407; *Chitty on Pleadings*, 7th ed. p. 407. (Counsel's attention was directed to *Voet*, 2, 1, 48).

There was no appearance for the defendant.

DE VILLIERS, C.J., said:—All the matters to be adjudicated upon arise from the same cause of action, namely, the alleged abduction, and before there can be any abduction the marriage of the parties must first be established. The *Attorney-General* may be right in his contention that it was open to the Magistrate to go into the case to test an exception to his jurisdiction; but in this case on the face of

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the summons the Magistrate was asked to grant what he had no power to do, viz., to grant an order for the restoration of the plaintiff's wife and an interdict restraining the defendant from harbouring her. According to *Van der Linden* the defendant is bound to state the exception of want of jurisdiction *in initio litis*, as had been done in this case. The exception having been taken, the Magistrate very properly allowed it.

DENYSSEN, J., said:—I think so too. Independently of the fact that this is a novel procedure, I think that this exception was properly taken and properly allowed. Damages were claimed for abduction, and there could not be an abduction unless the marriage was first proved.

Appeal accordingly dismissed, with costs.

[Applicant's Attorneys, REID & NEPHEW.]

THE ORIENTAL BANKING CORPORATION vs. LIPPERT & Co.

Letter of Credit.

The holders for value of certain Bills of Exchange, drawn without the date being filled in, against a letter of credit, who had bona fide held over the bills for a short time and afterwards filled in the date, but had presented the bills within the period specified in the letter of credit, held entitled to recover.

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W. A. Lippert & Co. were summoned to answer the Oriental Banking Company (limited), in an action of debt.

Plaintiff's declaration alleged that the defendants, who carried on business as merchants in Cape Town, on the 10th June 1875, wrote and sent to one Ernest Seyd, then residing at Kimberley, a certain letter of credit, to the purport and effect following:

"L/C, E, No. 7.

"Cape Town, June 10th, 1875.

"MR. ERNEST SEYD, Kimberley, D. F.

"DEAR SIR,—We hereby beg to place at your disposal a credit of £5,000 to be used in your draft or drafts on us at any sight convenient to you. All drafts against this L/C to bear the above L No. E, No. 7, and to be endorsed on the back of same. This L/C to be in force for three months from date, and all drafts to be issued and negotiated before that date, viz.: September 10th, 1875. The letter to be returned to us as soon as fully used or expired. We now hereby engage with you and all *bona fide* holders of drafts as against this L/C to honor all drafts issued against

the same on presentation, provided they are drawn in conformity with the above terms.

"We remain, dear Sir, yours truly,
"pp. W. A. LIPPERT & Co.,
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That the said Seyd thereafter lodged the said letter of credit with the plaintiffs as security for certain advances made by them to him; and that relying thereon, the plaintiffs from time to time made advances to Seyd, who, on the 2nd August, 1875, in terms and under, the authority of the letter of credit, drew upon the defendants two bills of exchange to his own order, for £2,000 and £3,000 respectively, payable thirty days after sight, which bills of exchange were endorsed by Seyd to and in favour of the Cape Commercial Bank, the agents in Cape Town of the plaintiffs, in consideration of the aforesaid advances made to him; that these bills of exchange were presented for acceptance on the 12th August, and for payment on the 12th September, but the defendants refused to accept or pay the same; wherefore the plaintiffs prayed judgment, with interest and costs.

The defendants pleaded first, that save as after excepted, the general issue. Secondly, that the drafts in the declaration mentioned were not issued or negotiated or endorsed on the said letter of credit in accordance with its true intent and meaning, and as required by the terms thereof, and that Seyd was not entitled to lodge and the plaintiffs to receive the letter of credit as security for advances to be from time to time made; that Seyd under and by virtue of the letter of credit and by the use thereof as aforesaid obtained from the plaintiffs and repaid to them a far larger sum than the said £5,000 previously to the date of the drafts, and that he was enabled in consequence of so lodging and using the letter of credit to obtain credit and carry on business contrary to the true intent and meaning of the letter of credit, and that the plaintiffs were in fact now seeking in this action to recover from defendants a balance of a current account with Seyd, and were not holders of drafts drawn *bonâ fide* against the letter of credit. That the letter of credit was given to enable Seyd to make purchases for the defendants and to draw upon them for the amount of such purchases, and for no other purpose, of which the plaintiffs had notice; and that all the purchases made by Seyd thereunder and remitted to the defendants amounted to £2,000 or thereabouts, which sum the defendants tendered before action. Thirdly, that Seyd died on the 3rd August, 1875, and that although the drafts in the declaration mentioned bear the signature of Seyd, they

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were not complete at the time of his death, but were filled in wholly or in part, or were added to in a material particular, by or on behalf of the plaintiff, after the death of Seyd; wherefore the defendants submitted the plaintiffs ought not to have and maintain this action.

The replication was general.

The evidence of the officers of the Diamond Field branch of the Bank was taken, detailing the circumstances under which the letter of credit was deposited with the Bank and the drafts drawn against it, and also evidence to show the nature of the transactions between Seyd and the defendants.

Seyd, who died suddenly on the morning of the 3rd August, left his affairs very much involved, and his estate, since sequestrated, was not likely to pay more than 2d. or 3d. in the £. Considerable correspondence was read. The material facts proved will be found mentioned in the judgments given below.

Cole (with him *Upington*), for the plaintiff, contended that the Bank had complied with all the conditions required of them by the terms of the letter of credit, and that no implied conditions not expressly stated could be imported into the letter of credit. Though the date might not have been filled in on the drafts at the time, still that was an immaterial particular, as the date was not an essential part of a draft. The evidence also showed that £2,750 of the amount advanced by the Bank had reached the defendants, and by their plea they admitted having received diamonds to the value of a further sum of £2,000. At all events the Bank had given full value for the letter of credit, and as *bonâ fide* holders were entitled to payment of the drafts drawn against it. (*Byles on Bills*, 9th ed., p. 74; *Thomson on Bills*, ed. 1865, p. 37; *In re Agra and Masterman's Bank*, *ex parte Asiatic Banking Co.*, 36, L.J., *Chanc.*, p. 222; *Maitland vs. the Chartered Bank of India*, 38, L.J., *Chanc.*, p. 363).

Jacobs, A.-G., (with him *Buchanan*), for the defendants, referred to the equities of the case as being against the Bank. By the way in which the letter of credit had been dealt with, the defendants had been kept in ignorance of the fact of advances having been made. Seyd had on the deposit of the letter of credit been allowed to overdraw his account, and it was only after his death that the Bank gave credit for the drafts which had been left in their hands in an incomplete condition. This was a dealing with the letter of credit contrary to its terms, by which the defendants had been damnified. If there was any variance between the pleas and the evidence, it was owing to the fact that the circumstances were within the knowledge of the bank authorities

only, and had only become known to the defendants at the trial. The Bank had been guilty of *laches* in not sending the drafts for presentation within a reasonable time after they were drawn.

Cole replied, and read from the correspondence to show that the transactions between Seyd and the defendants amounted to a partnership, and that there was no ground for imputing want of *bonâ fides* to the Bank.

Cur. adv. vult.

Postea (December 16),—

DE VILLIERS, C. J., in giving judgment said:—Before considering the legal questions involved in this case it will be convenient briefly to review the facts. About the middle of last year the defendants, who are general merchants trading in Cape Town, Port Elizabeth, and Hamburg, entered into an arrangement with one Ernest Seyd, a diamond merchant in Griqualand West, under which he was to purchase diamonds at the Fields, and remit them to the defendants for sale in Cape Town or elsewhere, the defendants and Seyd sharing equally in the profits. The funds for the purchase of the diamonds were found by the defendants, who from time to time granted open letters of credit to Seyd and accepted bills drawn by him against such letters. For granting these letters of credit the defendants received a commission of $2\frac{1}{2}$ per cent., which was to be deducted from the profits before distribution. All the transactions which took place under this arrangement were entered in a general account between the parties. Besides this general account there was what was termed a joint local account, in which were entered all transactions relating to another speculation or adventure, under which the defendants likewise supplied Seyd with credit, and he purchased diamonds at the Fields, but instead of remitting them to the defendants he sold them again at the Fields with a rising market, and accounted to the defendants for one-third of the profits, and not only guaranteed to keep the defendants free from loss but undertook to pay them the minimum sum of £50 per month, and never to be the holder of diamonds of more than £2,000 value at a time. The accounts of the two speculations were kept distinct as far as this was possible, but on more than one occasion money raised under the letters of credit was applied by Seyd with the knowledge of the defendants to payment for purchases made for the purposes of the local speculation. Thus in one of their letters (27th May, 1875), the defen-

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dants write to Seyd as follows: "*Local account*: Enclosed we beg to hand you our letter of credit E., No. 6, for £2,000, at 90 days' sight, being for renewal of draft on this account;" and in another letter (17th June, 1875), they write; "*Local account*: Your draft for £2,000 against this speculation matures to-morrow, but you have not remitted us against the same, at which we are surprised, as we counted on it for sure, you holding our letter of credit for it some time already." On a subsequent date (15th July, 1875), the defendants write to Seyd insisting upon his keeping the two accounts distinct in the following terms: "*Local and general account*: We note that you had disposed of the old lots on hand long ago already, and that we would receive an amalgamated statement, but we must insist on your keeping these accounts distinctly apart, and rendering us separate account sales for the general account, as otherwise we should get into great confusion;" to which Seyd replies: "*Local and general account*: As you lay stress upon keeping these accounts quite separate I will so do in future." But so far as the letters of credit were concerned, the defendants left it entirely to Seyd's discretion to use them in the manner most advantageous to their joint interests, frequently, however, warning him to exercise the greatest care and caution. Thus in their letter enclosing one of the letters of credit (5th December, 1874), they say: "As a further proof of our confidence we beg to enclose a new letter of credit for £5,000, marked E., No. 3, on the same terms as before, of which we trust you will approve and only use the same in the most discretionate way." On the 18th June, 1875, the defendants sent to Seyd the letter of credit now in question, which is in the following terms:—

"Letter of Credit E., No. 7.

"Cape Town, 10th June, 1875.

"To MR. ERNEST SEYD, Kimberley.

"DEAR SIR,—We hereby beg to place at your disposal a credit of £5,000 to be used in your draft or drafts on us at any sight convenient to you. All drafts against this letter of credit to bear the above letter of credit E., No. 7, and to be endorsed on back of same. This letter of credit to be in force for three months from date, and all drafts to be issued and negotiated before that date, viz., September 10th, 1875. The letter to be returned to us as soon as fully used or expired. We now hereby engage with you and all *bonâ fide* holders of drafts as against this letter of credit to honour all drafts issued against the same on presentation, provided they are drawn in conformity with the above terms."

In the letter enclosing this document the defendants write to Seyd as follows:—*Market*.—We are sorry to learn the unfavourable turn your market has taken, but trust you have realised the remainder at better rates than anticipated,

but anyhow without loss, and that we shall soon make this difference up again by fresh operations. For this purpose we beg to enclose a fresh letter of credit, viz., Letter of Credit E., No. 7, for £5,000, which we beg to recommend you to use with the greatest discretion and care." On the 1st of July following the defendants wrote a private note to Seyd informing him that in future they would in their letters of credit for the purchase of diamonds for Cape Town insert the clause "under attachment of parcels," but after this date no fresh letter of credit was granted to Seyd. The plaintiffs in this case were Seyd's bankers at the Diamond-fields. The account between them (which has been produced) extends back as far as September, 1874, and gives the daily balances from that time until the 3rd August, 1875. These daily balances are sometimes in Seyd's favour, but the great majority show overdrafts in amounts varying from a few pounds up to nearly £5,000. It was customary for Seyd, upon receiving letters of credit from the defendants, to lodge them with the plaintiffs, and upon the security of such letters of credit and of drafts drawn against them he was allowed to overdraw his account. Thus on the morning of the 3rd of June there was a balance in Seyd's favour. On the same day he deposited with the plaintiffs the letter of credit for £2,000 dated 27th May, and thereafter was allowed to overdraw his account to the extent of £1,200. It is worthy of notice that the chief item causing this overdraft was a cheque for £1,507 10s. on the plaintiffs' bank, the amount of which was paid to him and by him remitted to the defendants. On the morning of the 17th June Seyd's account was overdrawn to the amount of £1,791, and on the same day he received credit for the sum of £1,945 17s., being the amount of the draft dated 17th June, and drawn against the letter of credit of the 27th May for £2,000, less discount. Mr. Green, the temporary manager, states that this transaction had been completed on the 16th, but was not entered in the Bank's books until the 17th. On the 17th of June Seyd lodged with the Bank the letter of credit of the 10th June, stating that he would have to draw against it, and that he wished the Bank to make the advances to him. The manager having agreed to this, Seyd on the same day deposited with the Bank a bill for £3,000, drawn by him against the letter of credit of the 10th, and endorsed by him in blank, but at his special request the date was left blank until he should request the Bank to send it forward. The manager then authorised Seyd to draw on the Bank for the amount of the bill, and accordingly we find that on the following day he drew several cheques upon the bank, by the payment of which

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his account was overdrawn to the extent of about £3,000. Here also it is worthy of notice that among the cheques so drawn there was one in favour of one Dunkelsbühler for £2,750, and that the proceeds of this cheque have been distinctly traced into the defendant's hands. On the 12th July, Seyd's account being overdrawn to the amount of £3,410, he deposited with the Bank another bill drawn by him against the balance of the letter of credit of the 10th June, viz., for £2,000, and endorsed by him in blank, and at his request the date of this bill also was left blank, until he should desire the Bank to send it forward. From that time Seyd continued to overdraw his account until the 2nd of August, 1875, when the overdraft reached the sum of £4,757 16s. 8d. Here it should also be mentioned that from the 17th of June to the 2nd of August Seyd from time to time sent diamonds to the defendants of the invoiced value of about £2,000. On the second of August Mr. Ross resumed his duties as manager, and finding among the documents handed over to him by the temporary manager the two undated bills for £3,000 and £2,000, he at once sought an interview with Seyd and asked his permission to have them sent off by first post. Seyd told him to date the bill for £3,000 the 2nd August, to credit his account with the proceeds, and to send the bill to the defendants by the next post. Upon being asked what he intended doing with the draft for £2,000 Seyd answered that he would see the manager later on in the day. Before the Bank closed on that day the date of the £3,000 bill was filled in. After the Bank office had closed, the manager again had an interview with Seyd, and was directed by him to date the £2,000 bill also the 2nd August, to credit his account with the proceeds, and to dispatch this bill along with the other by the first opportunity, as he (Seyd) now had everything in order. The manager, being pressed for time, delayed the filling in of the date till the following morning, but before he could do so he was informed of Seyd's death, which took place suddenly on the morning of the 3rd August, at about 9 a.m. The date of the £2,000 bill was filled in at 10 a.m. Seyd's account was duly credited with the amount of both bills, and they were both sent to Cape Town by the first opportunity. They were duly presented by the plaintiffs' agents for acceptance and payment, but were dishonoured. The object of the present action is to recover the amount of these bills. Substantially the defence is threefold. In the first place the defendants say that in dealing with the letter of credit and the bills drawn against it, the plaintiffs did not observe the terms of the letter of credit itself,

either express or implied. In the next place they contend that the plaintiffs are not *bonâ fide* holders of the bills, having taken them with the knowledge that Seyd was using the letter of credit in fraud or violation of his agreement with the defendants. And, lastly, they allege that the bills were not complete at the time of Seyd's death, and that after his death material additions were made to them. The defendants, however, admit that diamonds had been purchased by Seyd under the letter of credit and remitted to them, and they tender the sum of £2,000 as the value of these diamonds: although it appears that after making of the first tender they were sold and realised no more than £1,600. In the view I take of the case, it will be unnecessary for me to again refer to this tender. Upon the first question raised by the defendants, I am unable to find that any of the express terms of the letter of credit have not been complied with. No more than £5,000 was drawn against it, an endorsement of the drafts was duly made on the back, the drafts bear the proper mark, they were issued and negotiated before the 10th of September, and the plaintiffs' agents were prepared to return the letter of credit to the defendants upon their accepting the drafts. Nor can I find that the plaintiffs' dealings have been at variance with the implied provisions of the letter of credit. It is said that it is against the very nature of such a document that it should be used, or that bills of exchange drawn under it should be sued, for the purpose of paying or securing the private debts of the person to whom it is addressed, or for the purpose of securing his overdrawn account. But in the absence of any prohibition on the face of the document it should, I apprehend, rather be presumed that the writer intended to leave the proper use thereof entirely to the discretion of the person to whom it is addressed. In the case of *Maitland vs. the Chartered Mercantile Bank of India, London, and China*, Lord Justice (then Vice-Chancellor) JAMES held that the Bank, as the *bonâ fide* holder of bills of exchange drawn under open marginal letters of credit, were entitled to require the grantors of the letters to accept the bills, although it appeared that the bills had been given in satisfaction of a promissory note on which the grantees of the letters of credit were themselves liable to the Bank, and for the purpose of releasing other documents which had already been deposited by the grantees with the Bank. Now, supposing in the present case that at the time when the letter of credit and drafts were first delivered to the plaintiffs, Seyd had already overdrawn his account to the extent of £5,000, the plaintiffs would, if the decision just quoted be correct, be entitled to require the defendants

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to accept the bills; or, supposing that the plaintiffs had not been Seyd's ordinary bankers and had advanced the money to him upon the security of the letter of credit, the defendants could not legally justify their refusal to accept any bills properly drawn and duly presented for acceptance. But I fail to see upon what principle the plaintiffs should be deprived of this right by the circumstance that the letter of credit and drafts were delivered to them before the overdraft reached the full amount of £5,000, and before the bills were finally completed, or by the fact that the plaintiffs were Seyd's ordinary bankers. The next question is, did the plaintiffs take the drafts with the knowledge that they had been drawn in fraud and violation of an agreement between the defendants and Seyd? for if they did they would not be assisted in this Court, however strictly the provisions of the letter of credit may have been complied with. The agreement is said have to been this, that money raised by means of drafts against the letter of credit should be applied to the purchase of diamonds, and that these diamonds should be sent to the defendants. But it is not quite clear that this was the real agreement: for, as I have already remarked, drafts were sometimes drawn against letters of credit for the purposes of the local speculation, in which case not the diamonds, but their proceeds, would be sent to the defendants. Nor is it clear that the Bank had notice of the agreement between Seyd and the defendants, whatever may have been the terms of that agreement. Neither Green nor Ross was asked in cross-examination whether he had such notice. It is true that, in answer to a question from the Court, Green said that the reason given by Seyd for his request not to forward the drafts immediately was that he wished to complete some parcels of diamonds which he intended to forward to the defendants, but in the face of the actual dealings between the parties, this answer does not appear to me sufficient to prove notice of the alleged agreement. Ross, the manager, also said that he was aware from what Seyd had told him, that Seyd received money to buy diamonds to send to the defendants, but he adds that on one occasion Seyd told him that he had money from the defendants for local speculation, that is to buy and sell diamonds at the Fields, and that he (Ross) was really under the impression that the defendants and Seyd were in partnership. There is perhaps more force in the argument that if the defendants had known in June last that Seyd had been allowed to overdraw his account on the security of the letter of credit, they might have protected themselves in time; and that as the plaintiffs did not give notice of the transaction to the defendants; and did not

immediately upon receipt of the bills complete them and forward them for acceptance, it would be against equity to hold the defendants liable in this action. In my opinion, however, this argument should not prevail unless it can be shewn that the plaintiffs acted fraudulently or *malâ fide*. However suspicious the transactions might at first appear, I am unable to come to the conclusion that the plaintiffs were guilty either of fraud or *mala fides*. They might not unreasonably believe that Seyd would keep his supporters informed of his dealings with the letter of credit. If Green's evidence is correct (and I see no reason for doubting its correctness) nothing in what was said to him by Seyd indicated any fraudulent purpose in keeping back the drafts for a time, or postponing their completion. The letter of credit itself does not require notice to the defendants of the drawing of bills against the same, nor does it require immediate presentations of the bills for acceptance. The bills being payable at so many days' sight, the mere postponement of presentation would be to the advantage of the defendants rather than to their detriment. For aught the plaintiffs knew, Seyd's account might have been overdrawn for the defendants' benefit as well as his own, and the money so obtained sent to the defendants, or applied to the purchase of diamonds for the purposes of both the speculations in which the defendants and Seyd were jointly interested. In fact the evidence shows that out of the money so advanced the sum of £2,750 came into the defendants' hands, and the defendants admit that diamonds of the value of at least £1,600 reached them from the same source. Assuming, then, that the plaintiffs are *bonâ fide* holders of the bills, the next question is whether any material addition has been made to these bills, so as to vacate them or either of them. As the bills were payable so many days after sight, the addition of the date does not appear to me a material one. But even if it were material, it was made to supply an omission and in furtherance of the original intention of the parties, and would not, therefore, according to *Byles on Bills* (11th ed., p. 321), vacate the instruments. The date of the 2nd August was filled in at Seyd's request, and that date seems to be the proper one, for it was the day on which Seyd finally directed its transmission for acceptance, and on which he was credited for the amount by the Bank, although, owing to the press of business on the 2nd, the formal entries of the credits did not appear in the Bank's books until the following day. The defendants having, in my opinion, failed in the proof of their special pleas, it only remains for me to consider whether there is sufficient privity of contract between the plaintiffs and defendants as to entitle

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the former to the benefit of the promise made by the latter under this letter of credit. On this point there appears to me to be no difference between the law of this Colony and the law of England, which has been so well expounded in the cases of *Ex parte Agra and Masterman's Bank* (2, L.R., Cha. App., 391), and *Maitland and Chartered Bank* (38 L.J., n.s., Eq. 363). The defendants by their letter of credit promised all persons who should in due course become *bonâ fide* holders of bills drawn against the letter of credit, that the bills would be duly honoured. They stand in the same position towards such holders as if they had actually accepted the bills. The plaintiffs being such *bonâ fide* holders, are therefore in my opinion entitled to recover from the defendants the amount of the bills in question, viz., the sum of £5,000, with costs.

DENYSSEN, J., said :—This is an action for the recovery of the sum of £5,000, upon two drafts which had been drawn by one Seyd upon the defendants, under and by virtue of a certain letter of credit, given by the defendants to the said Seyd, and which had been deposited by the said Seyd in the Oriental Bank as security for said drafts, and which the defendants now refuse to accept or pay. The defence to the action is that these drafts were not issued, negotiated, or endorsed as by the said letter of credit provided; that the said Seyd was not entitled to lodge or the plaintiffs to receive the said letters of credit for advances to be from time to time made as in the declaration mentioned; that the said Seyd under and by virtue of the letter of credit and the use thereof obtained a far larger sum than the said sum of £5,000, and repaid to the said plaintiff a larger sum than the sum of £5,000 previous to the date of the draft; that the said Seyd was enabled in consequence of the lodging and using thereof to obtain credit to carry on business contrary to the true intent and meaning of the said letter of credit; that the plaintiffs are in fact now seeking to recover from the defendants the balance of an account current with the said Seyd, and are not holders of drafts drawn *bonâ fide* against the said letter of credit. In another plea the defendants allege that the letter of credit was given to make certain purchases and for no other purpose, of which the plaintiffs had notice, and that all the purchases made and remitted amounted to the sum of £2,000, which sum they tender to pay to the plaintiffs. And finally, the defendants allege that the said Seyd died on the 3rd August, after which the drafts were completed; and for all these reasons that they were justified in refusing the acceptance and payment of the draft. The replication is general. It appears that the defendants

and Seyd for some time previous to the transactions now in question had dealings, and that on many occasions letters of credit had been granted by defendants to Seyd, for the purposes of and in connection therewith. These letters of credit were open letters of credit, and the only condition they contained was as to the limitation of the amounts; the observance of certain marks upon the drafts to be drawn by virtue of the letter of credit; the manner in which they were to be endorsed; and the time within which the drafts were to be used and negotiated. No other conditions appeared upon the face thereof. On the 10th June, 1875, the letter of credit now in question was issued, received on the 17th June, and deposited on the same day with the plaintiffs, who thereupon, through the acting manager of the Bank, agreed with Seyd to allow the latter to draw upon the Bank such sum or sums of money as were required by him under that letter of credit, and for which drafts were to be given upon the defendants. On the same day a draft was drawn by Seyd for £3,000 upon defendants, completed in every respect except as to the date; and on the 10th July another draft was drawn for £2,000 in the same way, Seyd desiring that the dates of both the drafts should not be inserted until he should so require. These drafts were drawn upon defendant at thirty days' sight, authority having been given by defendant in the letter of credit to draw at any sight. On the 2nd August both these drafts were ordered to be dated of that day, and to be forwarded to the defendants, although the date of the draft for £2,000 had not been filled in until the 3rd, when Seyd died, and after his death, the plaintiffs knowing it. Seyd had been dealing with the Bank, and the books and accounts show transactions to a large amount; he was also engaged in various transactions which varied, in some respects savouring much of a partnership, but it cannot be doubted that he enjoyed the confidence of all the parties concerned. There is no *mala fides* pleaded, nor that the draft had not been presented within a reasonable time, and no such question can therefore be entertained. Under these circumstances can there be any doubt that the defendants are liable for the amount of these two drafts drawn by virtue of the letter of credit? Excepting as to the certain conditions stipulated, there is no other restriction upon the face of the letter of credit; and so long as those conditions were attended to, Seyd's authority to draw and defendants' liability to pay are undoubted; all mercantile transactions between foreign parts would indeed be shaken, and faith reposed in letters of credit destroyed, if it were otherwise. It is alleged in the plea that the drafts were

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not issued, negotiated, and endorsed according to the true intent and meaning of the letter of credit. I am at a loss to find out in what respect; the documents speak for themselves, and as for the non-production of the letter of credit when it was required, to see whether it had been properly endorsed, which is denied upon trustworthy evidence, it could hardly have been expected that the letter of credit would be given up before the drafts had been satisfied. Nor do I understand the meaning of the allegation that Seyd was not entitled to lodge and the plaintiffs to receive the letter of credit for the payment of advances from time to time to be made, in manner as in the declaration mentioned; the very object of the letter of credit being to enable Seyd to obtain these advances for purchases to be made from time to time. How far it enabled Seyd to procure advances to a larger amount than he would otherwise have been able to do, or to extend his credit beyond the sum authorised, is of no importance. So long as the defendants are not called upon beyond the amount of the letter of credit and the terms upon the face of it, they are responsible to the plaintiffs, who were not presumed to know what the private instructions, if any, were to Seyd. Another defence is that this credit was allowed to Seyd for the purchase of diamonds, of which the plaintiffs were aware, and as he has purchased only for £2,000 which is tendered, they (the defendants) are not liable for any more. Here again the defendants fail to prove any notice. True, Seyd told the acting manager that he required the drafts to lie over from 17th June and 10th July, or until requested to be forwarded, because his parcels were not completed; but this is not sufficient evidence that Seyd's private instructions limited him to the purchase of diamonds, and that such instructions had been communicated to the plaintiffs; if such had been the object it should have appeared on the face of the letter of credit, or some other provision made so as to ensure that object. The only other defence contested is the incompleteness of the draft for £2,000, of which the date was filled up after the death of Seyd. It is clear that before his death Seyd had ordered it to be so filled up, like the other for £3,000, with the date of 2nd August, and to be forwarded by the next post. It was only in consequence of the late hour of the day that it was not then filled up; but what does that matter? Suppose it had not been dated; Seyd was authorised to draw at any sight. The draft was drawn thirty days after sight. It was in every other respect complete, and the date under such circumstances is immaterial. I did not refer to the legal authorities that bear upon this point, as well as upon

other points, as they do not admit of any question, and as they have been so fully commented upon; but it is quite clear to me that there must be judgment for plaintiffs, with costs.

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Judgment for plaintiffs accordingly, as prayed, with costs.

[Plaintiffs' Attorney, MOORE.
Defendants' Attorneys, FAIRBRIDGE & ARDEBNE.]

TOWN COUNCIL OF GRAHAM'S TOWN vs. MULLINS.

*Graham's Town Municipal Act, No. 23, 1869, section 65.—
Exemption from Rates.—Kafir College.*

The residence of the Principal of the Kafir College at Graham's Town, on the premises used for the purposes of the Institution, does not prevent the property being exempted from rates under the proviso to the 65th section of the Graham's Town Municipal Act, as being property "solely appropriated to the purposes of education."

The Rev. R. J. Mullins was summoned in the Court of the Resident Magistrate of Graham's Town, at the instance of the Town Council of that city, for the payment of £7 10s., being the amount of a rate assessed by the Town Council upon certain property occupied by the defendant. The defendant pleaded, first, the general issue; and specially, that the premises sought to be rated were the premises known as the Kafir College Institution, of which the defendant was the Principal in charge, and that the property was exempt from rates under the 65th section of Act No. 23, 1869.

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It appeared that the property in question belonged to the See of Graham's Town, and had been rated in the ordinary way, and that no objection had been made to the assessment. The premises were known to the Municipal authorities as the Kafir College for the training of Kafir boys. The Rev. Mr. Mullins, as principal of the Institution, occupied, together with his family, a portion of the buildings and the assistant masters and students the remainder, for the purposes of the education of the natives, and as an industrial school. Mr. Mullins received no pecuniary benefit from the school, which was maintained partly by the earnings and partly by voluntary contributions. Mr. Mullins considered his residence as Principal necessary for the well-

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being and proper conduct of the Institution. All monies raised were appropriated for the purposes of education, and to no other purpose.

The Magistrate on this evidence gave judgment for the defendant. The Town Council now appealed.

Jacobs, A. G., for the Town Council, contended that the Magistrate's judgment was wrong. The proviso to the 65th section of the Graham's Town Municipal Act enacted that no rate or assessment should be imposed upon certain properties, among others "upon buildings on lands attached thereto solely appropriated to the purposes of education." By the true construction of this section, buildings in which the defendant and other masters resided were not exempt, as they could not be said to be "solely" appropriated to educational purposes. If the Principal was required by law to reside on the premises it would be different, but a distinction must be drawn between persons required to reside on the premises and those who did so for the sake of convenience. The establishment was not "solely" educational, as the evidence showed certain profits were made. (*Congreve vs. Upton*, 33, L.J., M.C., 83; *Queen vs. Temple*, 22, L.J., M.C., 129.)

Cole, for the respondents, was not heard.

DE VILLIERS, C.J., said:—Every case of this kind must be decided upon its own merits; and therefore the decision in this case will not necessarily affect other educational institutions. In this particular case we have it in evidence that this is an institution for the education of the natives; and the best education which can be given them is an industrial one in addition to book-learning. For the purpose of giving them such a training it is stated to be absolutely necessary that the Principal should reside upon the premises, that he may superintend the students at all times. If, then, it is necessary to have the Principal there, the only question which remains is, whether the amount of accommodation provided for him is reasonable or not. There is no evidence that it is not reasonable; and therefore I think these premises fairly fall within the exemptions mentioned in the Act. In this case the very building in which Mr. Mullins resides is devoted to the purposes of education. He has no other purpose in view than that of educating the boys under him, and qualifying them to earn their own living. It is said, however, that the word "solely" in the proviso must have some particular meaning, and that it was inserted to meet cases of this kind. I think that it was inserted to meet cases of a different nature; for instance, a person might have a private

residence and let part of it for a school, in which case the exemption would not apply. It seems to me that the object of the Legislature was to provide liberally for education, and the section must be liberally construed; but the construction I put upon it does not appear to me to be so much a liberal construction as one giving the correct meaning of the words. The judgment of the Magistrate must be upheld.

DENYSSEN, J., fully concurred.

Appeal dismissed accordingly.

[Applicant's Attorneys, FAIRBRIDGE & ARDERNE.]
[Respondent's Attorney, PIERS.]

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TRUSTEE OF THORN vs. FRIEDLANDER.

Insolvency.—Indemnity.—Ord. No. 6, 1843, section 90.

Where a plaintiff had obtained a judgment upon his giving an indemnity, the Court interdicted him from suing out a writ of execution until the indemnity was given.

On the 30th of June last the above plaintiff recovered judgment in an action to set aside an undue preference against the defendant for £567 10s., upon the plaintiff giving the indemnity required by the 90th section of the Insolvent Ordinance, with costs. (*Vide ante*, p. 81.)

On the 7th August, the plaintiff's attorneys tendered the personal securityship of Mr. David Benjamin as the indemnity required to be given by the plaintiff to the defendant under the 90th section, in terms of the judgment of the Court.

On the 16th August defendant's attorney, in reply to the tender, stated that the indemnity required by the 90th section was not a simple guarantee, but a substantial protection against loss. That the loss which the defendant would sustain by an unconditional judgment, as mentioned in the 90th section, was the whole amount of the judgment recovered by the plaintiff, because on receiving the payment of the promissory note (which payment had been declared an undue preference in the case previously tried), the defendant had *bonâ fide* given up the promissory note, and in law had precluded himself from recovering the amount from the endorser, who at the time of the questioned payment was perfectly able to pay and did pay the greater

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part of the amount. He therefore suggested that the trustee should, instead of offering any security, indemnify and save harmless the defendant by simply abandoning the judgment.

On the 20th August the plaintiff's attorneys offered, if personal security was considered insufficient, to pay a sum of money into Court; or they proposed to issue a writ of execution against the defendant on the judgment *pro formâ*, and then the defendant could move for an interdict, on which application the meaning of the 90th section and the effect of the judgment could be argued and decided by the Court.

On the 23rd August the defendant's attorney wrote to state that the trustee must place defendant in a position to sue Brooks, the endorser of the promissory note; and stated he had been advised that an action against Brooks on the promissory note would not be successful.

The plaintiff's attorneys afterwards intimated that they intended to issue a writ to recover the amount of the judgment. Thereupon notice was given to the plaintiff to show cause why he should not be interdicted from suing out the said writ until the plaintiff had complied with the terms of the judgment, and with the true intent and meaning of the 90th section of the Insolvent Ordinance.

Affidavits were put in, in which it was stated that the trustee had never seen the promissory note for £567 10s., nor was it to be found among the insolvent's papers, and that the trustee believed it had never been noted against the endorser.

Uppington (with him *Buchanan*), for the defendant, now applicant, contended that the plaintiff was not entitled to sue out execution without first complying with the judgment, or having obtained leave of the Court. The defendant having acted *bonâ fide*, he was entitled to be indemnified against any loss he would sustain by having given up the promissory note. Brooks had endorsed only as security, and the note having been paid, he could not now be sued thereon, even if the document was forthcoming, which it was not. The amount of the indemnity the trustee ought to give would amount to exactly whatever the defendant had to pay, with perhaps the additional security for the costs he might have to incur.

Jacobs, A. G., (with him *Cole*), for the plaintiff, argued that in terms of the 36th Rule of Court, the plaintiff could sue out execution without leave being obtained. The plaintiff could not be expected to abandon the benefit of the judgment given in his favour. There had been an undue preference, and the defendant seemed to desire an indem-

nity against his own act. The question of the liability of Brooks was not now before the Court. The plaintiff was quite willing to give any indemnity that might be ordered, but on giving such indemnity he was entitled to the benefit of the judgment.

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Upington, in reply, cited the case of *Abbott vs. Pomfret*, 1, *Bing.*, N.C., 462, as to the non-liability of Brooks.

The Court granted an interdict restraining the plaintiff from suing out a writ of execution, until an indemnity should be given in terms of the 90th section of Ordinance No. 6, 1843, the question of costs to stand over, with liberty to either party to apply.

[Plaintiff's Attorneys, FAIRBRIDGE & ARDERNE.]
[Defendant's Attorney, VAN ZYL.]

MAGISTRATES' REVIEWED CASES.

ESCAPE FROM GAOL.

Ordinance No. 24, 1847, sec. 12.—Act No. 5, 1866–67, sec. 3.

The conviction of a prisoner charged under “section 3, of Act No. 1866–67,” with the crime of escaping from gaol, quashed. The charge should have been laid under section 12, of Ordinance No. 24, 1847.

DENYSEN, J., said a case had come before him as Judge of the week, in which the prisoner had been charged under section 3, of Act No. 5, 1866–67, and had been convicted by the Magistrate of the crime of having made his escape from gaol, and sentenced to three months' imprisonment with hard labour. The section of the Act mentioned in the charge referred to prisoners making their escape from custody when outside the precincts of the gaol. The charge should have been brought under section 12, of Ordinance No. 24, 1847. A person cannot be tried for an offence punishable under one act, and convicted of an offence under another. The conviction must therefore be quashed.

1875.
Nov. 25.
Escape from
Gaol.

PREVIOUS CONVICTIONS.

Act No. 20, 1856, sec. 42.

It is not competent under Act No. 20, 1856, section 42, for a Magistrate to sentence a prisoner to lashes, where the only previous conviction against such prisoner had been obtained on the same day.

DE VILLIERS, C.J., said a case had come before him as Judge of the week, in which a man named Tipp had been charged with theft and convicted and sentenced. On the same day he was tried for stealing some articles from another person, and on conviction was sentenced by the Magistrate to twenty-five lashes, and three months imprisonment with hard labour, to commence after the expiration of his previous sentence. It had frequently been held that the proviso relative to “second or subsequent conviction”

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Previous Con-
victions.

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victions.

in the 47th section of the Magistrate's Court Act, of 1856, did not apply where the previous conviction had been obtained on the same day (*vide Buch. Reports*, 1873, p. 18). The sentence must be amended by striking out the twenty-five lashes.

EVIDENCE ADMISSIBLE AT A SECOND TRIAL.

Wild Ostriches Act, No. 12, 1870.

Where a conviction has been quashed, and a new trial had, the record of the evidence taken at the first trial is not admissible at the second trial, but the witnesses themselves should be recalled.

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Evidence ad-
missible at a
Second Trial.

DE VILLIERS, C.J., said that among the cases which had come before him as Judge of the week, was the one of the *Queen vs. Odendall*. Some time ago a summons was issued against Odendall charging him with contravening the provisions of Act No. 12, 1870, in having captured some wild ostriches; but in this summons there was no allegation that Odendall had acted without a licence, nor was the evidence led before the Magistrate complete on this point. The 10th section of the Act would appear to throw upon the prosecution in such a case the onus of showing that the accused was not the holder of a licence, and further directed what should be considered sufficient *prima facie* evidence of the fact. The Magistrate convicted Odendall, but when on the last Circuit the case came before His Lordship for review, the conviction was quashed. After that a second summons properly drawn was issued against the defendant, and at the trial evidence was properly given to show that he did not hold a licence, but for the proof of the rest of the facts the Magistrate did not hear any witnesses, but took the record of the evidence given in the previous case as evidence in the subsequent case, and convicted the accused, and sentenced him to pay a fine under the second section of the Act. This being to all intents and purposes a criminal charge it was improper in the Magistrate to accept the records of evidence taken in the first case. He should have taken fresh evidence. This was decided in the case of *Reg. vs. Bertrand*, 1, L.R., P.C., 520; and had been followed in this Colony in *Thyart's* case. The last conviction must therefore also be quashed. At this second trial there had been an exception taken, founded on the former conviction, but it was unnecessary to consider that now.

APPENDIX.

[Before Sir WILLIAM HODGES, C. J., and Justices BELL
and WATERMEYER.]

EXECUTORS OF EATON *vs.* EATON.*

(Cited in *ex parte De Wet*, ante, p. 119.)

Privileged Will.

A holograph will of a parent, disposing of his property among his children, is a privileged testament, and is not subject to the provisions of Ordinance No. 15, 1845.

An action was brought by Charles Robert Eaton and Richard Paxton Dobie, who claimed to be the lawful testamentary executors of the late Richard Weber Eaton, against the widow and heirs of the said Richard Weber Eaton, for the purpose of having a certain instrument declared the last will and testament of the said Richard Weber Eaton, and the Master ordered to grant letters of administration thereunder.

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March 5.
Executors of
Eaton *vs.* Eaton.

The declaration set forth that on the 8th June, 1860, in his lifetime, the said R. W. Eaton wrote in his own proper handwriting, and signed with his usual signature, in the presence of two competent witnesses, a paper, which paper he then intended and declared to be his last will and testament; and that, in the said paper the plaintiffs were named as the executors thereof. That the said instrument was written upon one sheet of foolscap paper, and being so written was signed by the deceased and the two witnesses at the conclusion of the writing. That the Master of the Supreme Court had declined to grant letters of administration under the said instrument, by reason that it had appeared to the Master that the said instrument was insufficiently signed and attested, and was therefore not such as to warrant and support the plaintiff's claim to be executors as aforesaid; and that by the 20th section of Ordinance No. 104, of 1833, it had now become necessary

* Compiled from the Records, and the *Advertiser and Mail* of 7th March, 1863.—Ed.

1863.
Mar. 5.

Executors of
Eaton vs. Eaton.

that the validity and legal effect of the instrument should be decided by judgment of the Court. Wherefore the plaintiffs brought this action.

The defendants pleaded an admission of the allegations of fact in the declaration contained, and submitted that the instrument in question had not been executed as required by the provisions of Ordinance No. 15, 1845, and was therefore invalid.

Plaintiffs replied that the said will had been executed in accordance with the Ordinance No. 15, 1845, in the plea referred to. And for further replication in case it should appear to the Court that the said will had not been executed in accordance with the said Ordinance, the plaintiffs said, that the said will being the will of a father disposing of his property among his family, and written in his own proper handwriting as admitted by the plea, was a privileged will, and not subject to the provisions of the said Ordinance; and they further said, that as such privileged will it had been sufficiently authenticated, subscribed and attested, in the manner as in the declaration set forth, wherefore they prayed the judgment in the declaration prayed.

At the suggestion of the Court the averments contained in the plaintiffs' replication were embodied in the declaration. The will in question was written on a sheet of foolscap, folded at the back, and was written over three pages, the signatures being at the foot of the third page. The 3rd section of Ordinance No. 15, 1845, required the signatures to be upon at least one side of every leaf.

F. S. Watermeyer, for the plaintiffs, confined his argument to the question whether the will was a privileged one, it having been written by the testator's own hand, and devised his property to his children. He contended that such a will was privileged, and that the Master should be ordered to grant letters of administration thereunder, leaving it to any of the legatees, not being children of the testator, if so advised, to try its validity afterwards.

Denyssen, Acting A. G., for the defendants, contended that the will exceeded the limits allowed to privileged wills, and that consequently it must be set aside altogether.

The Court held that the will was in form a privileged will *inter parentem et liberos*, and sufficient to support a claim for granting letters of administration to the executors testamentary named therein.

Judgment for plaintiffs accordingly.

[Plaintiff's Attorney, J. R. REID.
Defendants' Attorneys, J. & H. REID.]

BEFORE THE PRIVY COUNCIL.*

THE DIVISIONAL COUNCIL OF THE CAPE DIVISION *vs.*
DE VILLIERS.

[Appeal from the Supreme Court of the Cape of Good Hope in *De Villiers vs. The Cape Divisional Council*, ante, p. 50.]

Cape of Good Hope Act, No. 10, of 1864.—Curators of Public Roads.—Compensation.

The Respondent, being proprietor of a certain perpetual quit-rent tenure, the Appellants as curators of public roads under Act No. 10, of 1864, and possessed under section 3 of all the rights which were vested in the Commissioners of Roads by Act No. 9, of 1858, contended that they had a right to enter the Respondent's land and take away gravel for the repair of public roads:—

Held, that such contention was correct. Under the terms of the Respondent's grant, and by established usage, the Government had such right, and under the Acts above mentioned such right had been transferred to the Appellants.

Semble, if the gravel had been taken from land of the Respondent which had been improved by cultivation, irrigation, or otherwise, he would have been entitled to compensation under section 12, of Act No. 9, of 1858, to be estimated in the manner provided by that section.

Appeal from a judgment of the Supreme Court of the Cape of Good Hope (June 10, 1875) in favour of the Respondent, by which the Appellants were ordered to pay to the Respondent £25 by way of damage for removing from certain perpetual quit-rent lands, the property of the Respondent, certain gravel, stones, and earth, for the purpose of repairing the main road, called the *Wellington Road*; and were restrained by perpetual interdict from again entering upon the said land of the Respondent without his

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* Present: Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER. Reported in two appeal cases, p. 567.

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licence, and from removing therefrom any gravel, stones, earth, or other matter or things; and were further ordered to pay the costs of suit.

It was, on the trial, shewn that the land in question, on which the alleged trespass was committed, was land granted on perpetual quit-rent, in the Dutch version termed "*Erfpacht*," to one *Jan Albertus Dell*, on the 30th of May, 1815, which was duly transferred to the Respondent on the 17th of February, 1866. In the original deed of grant of the said land, by Lord *Charles Somerset*, Governor of the Colony of the *Cape of Good Hope*, the same was limited, subject to certain conditions therein mentioned; and further, "the land thus granted" was described as "being further subject to all such duties and regulations as either are already, or shall in future, be established, respecting lands granted under similar tenure."

Prior to the 6th of August, 1813, an ordinary way of disposing of Crown lands in the Colony of the *Cape of Good Hope* was by means of loan, in which case no title was registered; but on the 6th of August, 1813, a public proclamation was issued in the Colony of the *Cape of Good Hope* by the then governor thereof, Sir *John Francis Cradock*, having the force of law, reciting, among other things, that although the establishment of loan leases might have been suitable to the early state of the Colony, when the wants of Government were not foreseen, it then appeared from experience that the loan tenure was injurious to that certainty so essential to the happiness and the interest of the inhabitants, and equally injurious to the public interest by preventing the holders from appropriating as much of their means to the improvement and extension of agriculture as they would do in case they had no right of re-assumption to apprehend, and might dispose of the ground as they pleased, by subdividing the same among their children, letting, selling, or otherwise alienating it in lots, cultivating it in the prospect of remote benefit by the planting of timber &c; and that, notwithstanding a gradual re-assumption of loan lands, and the regranting of the same in lesser portions on a more certain tenure, might considerably increase the colonial revenue, yet that, having taken into consideration the great utility of no longer delaying the improved cultivation of land by giving security to title, and of making the same, as speedily as possible, a general measure, the Governor, Sir *J. F. Cradock*, had adopted the following determination: To grant to the holders of all lands on loan, who might regularly apply for the same, their places on perpetual quit-rent (*erfpacht*), with the following rights and privileges, and on the following terms and con-

ditions, namely . . . And then followed seventeen sections of the Proclamation, to all of which it is not for the purposes of this report needful to refer. By the fourth of those clauses, however, it was proclaimed that "Government reserves no other rights but those on mines of precious stones, gold or silver, as also the right of making and repairing public roads, and raising materials for that purpose on the premises, other mines of iron, lead, copper, tin, coals, slate, or limestone are to belong to the proprietor."

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Mr. *Butt*, *Q.C.*, and Mr. *Griffith*, for the Appellants, contended that the land in question on which the alleged trespass was said to have been committed was and is land held on perpetual quit-rents tenure (in *Erfpacht*), and was and is subject to a condition that materials might be raised thereout by the proper parties for making and repairing public roads, and that the Appellants were the proper parties for repairing the same, and that their raising of gravel, which was the trespass complained of, was as materials for that purpose, and not otherwise.

Since the date of the Proclamation of 1813, no instance is shewn in which the Crown has ever enforced any other right than those mentioned in the said fourth clause over lands granted in perpetual quit-rent (*Erfpacht*), whether originally granted as such or converted from loan places, but these rights have been continuously exercised, and until the present case apparently without any dispute on the part of any holder of any perpetual quit-rent land, whether originally granted as such, or converted from loan place. By virtue of the Act of the Colonial Parliament, No. 9, of 1858, section 11, the Commissioners of Roads therein mentioned, or other officer by them duly authorised, were invested with all the legal rights belonging to the Government of the said Colony in respect, among other things, to the raising and carrying away materials for making and repairing public roads. By virtue of the Act of the Colonial Parliament, No. 10, of 1864, section 3, every Divisional Council was thereby invested, for the purposes of the said Act, which were for the construction and maintenance of the main roads of the Colony, with all and singular the rights, powers, and authorities set forth in the 10th, 11th, 12th, and 13th sections of the Act No. 9, of 1858, precisely as if such Divisional Council were the Commissioners of Roads in the said sections mentioned or one of such Commissioners.

The Respondent did not appear.

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The judgment of their Lordships was delivered by Sir BARNES PEACOCK :—

The Appellants in this case were the Defendants in a suit brought against them by the Respondent, who sought to recover against them damages for having entered his land and taken away gravel. The Defendants justified upon the ground that they had a right to take it for the repair of a certain public road; and the question is, whether the Defendants were justified or not in entering upon the Plaintiff's land and taking away the gravel. The Plaintiff is the proprietor of a certain perpetual quit-rent tenure, and the Defendants are the curators of the public roads under Act No. 10, of 1864, by section 3 of which they have all the rights which were vested in the Commissioners of Roads by the Colonial Act, No. 9, of 1858. By the 11th section of that Act it was provided that, "For the purpose of making any such main road the aforesaid Commissioners of Roads or other officer by them duly authorised are hereby invested for the purpose of so doing with all and singular the legal rights, if any, belonging to the Government of this Colony in respect to the taking of any land and the raising and carrying away materials for making and repairing public roads, whether such rights have been preserved to the said Government by the Proclamation of His Excellency Sir *John Francis Cradock*, bearing date the 6th day of August, 1813, permitting the conversion of lands on loan into places on perpetual quit-rent, or have been created by express stipulation or condition in any grant of freehold property, or exist in any other way or manner whatsoever.

The question, then, resolves itself into this: Had the Government the power to take gravel out of this land, which was held upon a perpetual quit-rent tenure: and that depends upon the grant itself and upon the Proclamation of the Government of the 6th August, 1813. The grant is to *Jan Albertus Dell*, of whom the Plaintiff was the transferee, of a perpetual quit-rent tenure, "subject to all such duties and regulations as either were then already or should in future be established respecting lands granted under similar tenure." The learned Chief Justice, in delivering his judgment, has shewn that the term by which quit-rent has always been known in the Colony is "*Erfpacht*," which is the term applied to the *Emphyteusis* of the Roman-Dutch law, and was also the term used in the Dutch version of the Proclamation, in the grant in question, and in all quit-rent grants, which prior to the year 1822 were made out in both the Dutch and English languages. The *jus emphyteusis* did not give the *Emphyteuta* the right of taking away gravel or minerals. The Proclamation of

1813 says, "Every holder of a loan place, on his making application by memorial to Government for the purpose, shall have a grant of this place on perpetual quit-rent to the same extent as he has hitherto legally possessed the same on loan." By clause 3, "The holder by this grant shall obtain the right to hold the land hereditarily, and to do with the same as he may think proper in like manner as with other immoveable property, as also, should he deem it advisable, to sell or alienate it." Then by clause 4, "Government reserves no other rights but those on mines of precious stones, gold or silver, as also the right of making or repairing public roads and raising materials for that purpose on the premises," and so on. Then by section 11: "This perpetual quit-rent shall further not be liable to any further burdens but those to which all freehold lands are already subject,"—that is, subject to the reservations which are expressed in this Proclamation;—"the perpetual quit-rent shall not be liable to any other burdens but those to which all freehold lands are already subject." Then by clause 6 it is provided that "In all judicial decisions regarding quit-rent the same rights, laws, and usages shall be observed which have hitherto been acted upon or which may hereafter be established, enacted, and followed in judicial decisions with respect to freehold lands." That must also mean subject to the reservations contained in the Proclamation. Their Lordships have arrived at the conclusion that the view of the case which was taken by the learned Chief Justice in the Court below was a correct one, namely, that the grant to *Dell* was subject to the reservation by Government of the right to raise and take gravel for repairing the public roads. The Plaintiff's own witness, Mr. *De Wet*, says: "I have been chief clerk in the Surveyor-General's office for about thirty-three years. I do not remember that the right of the Government to take gravel from quit-rent land, originally granted as such, was ever disputed." Therefore, whether the land was quit-rent granted in lieu of loan land, or of quit-rent originally granted, the same rule seems to have prevailed under the Proclamation. *Leopold Marquard*, another of the Plaintiff's witnesses, said: "There is no difference in the form of tenure between loan places converted into quit-rent and those originally granted as such." Therefore, not only by the terms of the grant as construed by the Chief Justice, but by the usage, the Government seems to have had the right of taking gravel, and that right has been transferred to the Divisional Council of the Cape Division by the two Acts to which allusion has been made.

In these circumstances their Lordships think that the

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decree of the Court below must be reversed. The Plaintiff asks in his plaint that in case it "shall be found that the Defendants have any right to remove gravel, stones, earth, or other matter or things from the said land, it may be declared by this Honourable Court that such right cannot be exercised with respect to cultivated, arable or sowing land without compensation to the Plaintiff." The learned Chief Justice in his judgment says: "There can be no objection to a judicial declaration to the effect that the Defendants are not entitled to take materials from such portions of the Plaintiff's land as have been improved by cultivation, irrigation or otherwise, without compensation to the Plaintiff, such compensation to be determined in the manner provided for by the 12th clause of Act No. 9, of 1858." Their Lordships are of opinion that if the gravel was taken from land which had been so improved, the Plaintiff would be entitled to compensation, but in his suit he does not allege that the gravel was so taken. The case for damages is for taking the gravel from his land; he does not say that the gravel was taken from land which had been improved, and that the Defendants had taken it without giving proper notice or offering compensation. Their Lordships do not think that this is a case in which there is any necessity to make a declaration of right in their decree, although they think it right to say that if the gravel was taken from cultivated land, the owner of the land would be entitled, under section 12, to receive compensation, to be estimated in the manner provided by that section.

Under all the circumstances their Lordships will humbly advise Her Majesty that the decree be reversed and the suit dismissed, and that the Respondent do pay the costs of this appeal.

[Solicitors for the appellant, VENNING, ROBINS & VENNING.]

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